

Discussion on the Further Improvement in the Right of Broadcasting in the Context of Tri-networks Integration

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ABSTRACT

"The right of broadcasting" is a historical product of the development of communication technology, specifically referring to wireless communication in international conventions, with a strong color of technicism. The practice of covering all non-interactive communication with "the right of broadcasting" in the third revision of the Copyright Law may create obstacles to understanding in institutional communication. In addition, the legislative design of placing live broadcasting behaviors in the right of broadcasting stems from a misunderstanding of international conventions, and this approach of distinguishing the source of works and qualitatively characterizing the behavior of live broadcasting works violates the principle of neutrality in communication technology, which, in the context of tri-networks integration, increases the difficulty of determining the type of rights and hinders the systematization of the right of communication. At last, the expression of different communication modes in the right of broadcasting by legislation deviates from international conventions. The future revision of the Copyright Law should abandon the use of "the right of broadcasting" and modify it to a more neutral "the right of playing". Referring to the specific meanings of "public communication" and "communication to the public" in international conventions, "the right of playing" should be simplified as a type of right to control non-interactive remote transmission, and the broadcasting behavior, screening rights, and performance rights in the right of broadcasting should be integrated into one "on-site communication right".

Keywords: *The right of broadcasting, The right to public communication, The right for communication to the public, Revision of the Copyright Law.*

1. INTRODUCTION

An important modification of the Copyright Law revised on November 11, 2020 is to expand the scope of "the right of broadcasting" control and include all non-interactive communication behaviors in it in a technology-neutral manner. After the newly revised Copyright Law comes into effect, wired initial communication, webcasting, online rebroadcasting, and online set-time broadcasting can be included in the determined "the right of broadcasting", and there is no need for them to rely on the interpretation of bottom clauses to obtain protection. However, the behaviors regulated by the right of broadcasting have specificity and refer to specific ones in international conventions. The appropriateness of

using this highly technical term to cover all technology-neutral non-interactive communication behaviors remains to be explored. In addition, this revision retains the type of broadcasting in the right of broadcasting that utilizes audio and video restoration equipment to broadcast received broadcasts, which will complicate the qualitative analysis of on-site communication behavior. In the context of tri-networks integration, telecommunication network, broadcasting network, and the Internet are mutually compatible, and their technology and business scopes are gradually becoming consistent.[1] It has become a reality to use a television screen to broadcast radio and television programs and on-demand content on the Internet. According to current legislation, if the played works originate from the received

broadcasts, they are subject to the right of broadcasting adjustments. If the played works are obtained through interactive means through the Internet and other channels, they may fall within the control of the screening or performance rights. The behavior of retaining live broadcasting in the right of broadcasting increases the difficulty of behavior determination and contract design in practice and doesn't follow the neutral legislative principle of designing rights based on the characteristics and effects of communication. To completely eliminate the technicism in the right of broadcasting and achieve more scientific adjustments to the communication of works in the context of tri-networks integration, it is necessary to improve legislation.

2. THE SPECIFIC REFERENCE AND TECHNICAL NON-NEUTRALITY OF "THE RIGHT OF BROADCASTING"

The third revision of the Copyright Law has expanded the scope of the right of broadcasting regulations, covering three types: remote transmission through wired and wireless means, and broadcasting after receiving broadcasts. The legislative amendment here conforms to the development reality of the integration of communication technology, but the choice of the term "the right of broadcasting" is not appropriate. The following will explain the disharmonious relationship between the extension and connotation of "the right of broadcasting" after its expansion from three aspects: the international copyright conventions and the field of communication technology have a fixed understanding of the specific communication methods referred to by the right of broadcasting;¹ the right of broadcasting's covering wired transmission and broadcasting after reception do not comply with technological neutrality; the choice of the term "the right of broadcasting" can easily lead to misunderstandings.

2.1 The Specific Mode of Communication Referred to by the Right of Broadcasting

The Copyright Law of 2001 stipulates the right of broadcasting, which refers to the right to "publicly broadcast or communicate works

1. Liu Yinliang. The Scope of Broadcasting Right in China in the View of System Evolution [J]. Law Science, 2018 (12): 3-20.

wirelessly, communicate works broadcasted to the public through wired transmission or rebroadcasting, and communicate works broadcasted to the public through amplifiers or other similar means of transmitting symbols, sounds, and images".² The Copyright Law revised in 2010 didn't make any changes to this provision. This provision directly originates from the relevant provisions on the right of broadcasting in the Berne Convention, which describes "broadcasting" as a right control behavior and was deeply influenced by the development of communication technology at that time, with profound historical traces. The Berne Convention stipulates Broadcasting and Related Rights in Article 11 (2), which, firstly, authorizes the broadcasting of its works or the communication of its works to the public through any other wireless transmitting symbols, sounds, or images; secondly, authorizes another institution other than the original broadcasting institution to communicate the broadcasted works to the public through wired transmission or rebroadcasting; thirdly, authorizes the public communication of broadcasted works through amplifiers or other similar means of transmitting symbols, sounds, and images. The Berne Convention doesn't provide further explanation for broadcasting, and the definition of broadcasting in the Rome Convention and WPPT³ can provide reference for understanding the scope controlled by the right of broadcasting. The definition of broadcasting in the Rome Convention is "radio transmission of sounds or images and sounds for public reception",⁴ and WPPT also stipulates that broadcasting refers to wireless transmission.⁵ From the expression of "broadcasting... or other methods of wireless transmitting symbols..." in the first case of control over the right of broadcasting under the Berne Convention, "broadcasting" and "other methods of wireless transmitting symbol..." belong to the same category of expression, and broadcasting should also belong to a type of wireless transmission. In

2. Article 10, Paragraph 1, Item (11) of the Copyright Law of the China (2001 Amendment).

3. WIPO Performances and Phonograms Treatment, abbreviated as WPPT in this article.

4. ROME CONVENTION, 1961 Article 3 (f) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds

5. WIPO Performance and Phonograms Treatment, Article 2 (f) "broadcasting" means the transmission by wireless means for public acceptance of sounds or of images and sounds or of the representations there; Such transmission by satellite is also "broadcasting"; Transmission of encrypted signals is "broadcasting" where the means for decryption are provided to the public by the broadcasting organization or with its sent;...

the relevant documents reviewing the technical background of the protection of broadcasting organizations, the World Intellectual Property Organization Standing Committee on Copyright and Related Rights said that broadcasting is generally understood as transmission through electromagnetic wave in copyright and related rights treaties.⁶ In the 1928 Rome Amendment Conference of the Berne Convention, it was decided to increase the provision of the right of broadcasting, which at that time only referred to "the exclusive right to transmit its works to the public through radio transmission".⁷ In subsequent text revisions, it gradually evolved into "Broadcasting and Related Rights" and covered the latter two behaviors of Article 11 (2). In 1948, the Brussels Amendment Conference of the Berne Convention replaced the term "radio transmission" in the Roman text with "broadcasting". Some writings mentioned this modification and pointed out that "It was not intended to change the meaning of the Roman text, but simply to simplify its wording. After replacing the wording of the Roman text with 'broadcasting', there is no need to explain the term 'broadcasting' again, as pointed out in the pre-arranged planning: 'Today, everyone knows the meaning of broadcasting'".^[2] Therefore, the right of broadcasting in the Berne Convention refers to transmission through wireless means.

In the second behavior controlled by Broadcasting and Related Rights in the Berne Convention, which involves the re-communication of received electromagnetic waves through wired transmission or rebroadcasting, the English expression for the term "转播" is "rebroadcasting", which refers to the wireless re-communication of received electromagnetic waves through the same means as the initial wireless transmission. And the technical background stipulated in the convention for wired transmission is that the received electromagnetic waves are transmitted to users' homes through coaxial cables in a wired manner, which has become an important transmission method. The signal quality of wired transmission is more stable, and compared to wireless transmission, it can ensure stable reception by users in areas with dense buildings or high mountain obstacles.⁸ When

6. See Standing Committee on Copyright and Related Rights, Protection of Broadcasting Organizations, Seventh Session, May 13 to 17, 2002, p.18.

7. The Roman text of the 1928 Berne Convention, Article 11 (2).

8. See Standing Committee on Copyright and Related Rights, Protection of Broadcasting Organizations, Seventh Session, May 13 to 17, 2002, p.6.

broadcasting organizations retransmit program signals through cable, they can add cable exclusive programs based on the received wireless signals. Therefore, the communication method of ensuring program signal quality and enriching user reception content through cable is becoming increasingly popular among the public. The Berne Convention also provides for the re-communication of received wireless signals through wired means in Broadcasting and Related Rights. However, this re-communication of received wireless signals through wireless or wired means is no longer within the scope of the right of broadcasting and should fall within the scope of "related rights" referred to in Article 11 (2).

From the provisions of the Berne Convention on behaviors controlled by Broadcasting and Related Rights, it has specific requirements for the technical characteristics of communication behavior, that is, the initial communication must be electromagnetic waves or other wireless methods. In addition, the behavior controlled by initial wireless communication and re-communication through wired or wireless is characterized by active transmission and passive reception.⁹ Whether it is through the signal tower or satellite to send the electromagnetic waves carrying the program, users can only receive them within the range covered by the signal. For users, they can't choose the content and time to watch, and can only passively appreciate specific works based on the broadcast schedule of the radio or television station. If they miss the broadcast time of the program, they can't watch it anymore, and can only wait for the opportunity to replay or meet the appreciation needs through other channels such as watching live performances. Therefore, the behaviors controlled by the right of broadcasting have specific technical and communication characteristics, and not all remote transmission behaviors can be included in the right of broadcasting.

2.2 Regulatory Issues Brought About by Technological Non-neutrality

In the provisions of the Berne Convention on behaviors controlled by Broadcasting and Related Rights, the initial communication must be wireless, which means that if a radio or television station directly transmits a work through a wired cable, it can't be included in the scope controlled by

9. See Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, p.211.

Broadcasting and Related Rights. This differentiated nature determination of behaviors by distinguishing between communication technologies is not justified. Whether the work is communicated wirelessly or in a wired manner, the ultimate effect is to enable the public who are not in the place of communication to appreciate the work, and there is no substantial difference in the communication effect. In other clauses of the Berne Convention, there are cases where a technology-neutral approach is adopted to stipulate "the right for communication to the public", such as Article 11 (1), Paragraph 1, Item 2, which stipulates the right to "communicate to the public" for the performances of plays, theatrical music, and musical works.¹⁰ This provision doesn't limit the technical means of communication, so direct transmission through wired cables can be included in the scope of this provision. However, the limitations of this provision are also obvious, that is, it only applies to the performances of "plays, theatrical music, and musical works" and stipulates the right for communication to the public in a technology-neutral manner. If these three types of works have not been performed, the rights holder still can't obtain protection through this provision. For example, if a certain television station directly communicates the lyrics and music texts of musical works through cable, it can't rely on the "Specific Rights of Plays and Musical Works" clause in Article 11 (1) for protection, nor can it rely on the "Broadcasting and Related Rights" clause in Article 11 (2) for claiming rights. Other provisions of the convention also stipulate the right for communication to the public in a technology-neutral manner, but also limit the types of works. This legislative approach that distinguishes between types of works and communication techniques has resulted in inconsistent levels of protection for different works in conventions.

The provisions on the right of broadcasting before the third amendment of China's Copyright Law are derived from the "Broadcasting and Related Rights" of the Berne Convention,¹¹ which

10. Berne Convention for the Protection of Literary and Artistic Works (1971), Article 11 (1).

11. But China has not adopted the "Broadcasting and Related Rights" of the Berne Convention to collectively refer to these three types of communication behaviors. Before the third revision of the Copyright Law, "the right of broadcasting" was used as the right title to regulate the behaviors of wireless transmission, rebroadcasting through wired and wireless channels, and broadcasting received broadcasts through receiving devices. This legislative design makes the scope controlled by China's right of broadcasting wider than the

required that the initial communication must be wireless. Therefore, direct transmission through cable in China is not within the scope controlled by the right of broadcasting, and can only be protected through the "other rights that should be enjoyed by the copyright owner" bottom clause. Besides, the behavior of retransmitting received radio/television signals through the network can't be classified as a second type of behaviors controlled by the right of broadcasting because it doesn't comply with the technical characteristics of wireless rebroadcasting or wired cable transmission. For a long time, in China, it can only be protected through the "other rights that should be enjoyed by the copyright owner" bottom clause. However, webcasting and online set-time broadcasting, as the initial communication is online and doesn't have the interactive characteristics required by the right to information network communication, can only be protected by a bottom clause. However, whether the work is communicated through the Internet, wireless electromagnetic waves, or wired cables, the impact on copyright holders remains the same. It is not reasonable to categorize behaviors into different types of legislative models based on the technical characteristics of communication. And the application of bottom clauses should be very cautious, and for the large and frequent webcasting and online re-communication behaviors in practice, they should be covered with certain rights, rather than relying on bottom clauses as a temporary measure to provide protection.

2.3 The Selection of Wording for the Right of Broadcasting in the New Law Can Easily Lead to Misunderstandings

In order to address the long-standing issue of not having clear rights to cover rebroadcasting, webcasting, and online set-time broadcasting received through the Internet, the Copyright Law, which was revised and passed on November 11, 2020, includes all non-interactive communication within the scope controlled by "the right of broadcasting" in a technology-neutral manner. Regardless of the technical means used for initial communication and re-communication, it will remain within the scope of the right of broadcasting regulation in the future. According to the latest revised Copyright Law, the right of broadcasting refers to "the right to publicly communicate or rebroadcast works through wired or wireless means,

"Broadcasting and Related Rights" in the Berne Convention, which only controls wireless transmission.

as well as the right to communicate broadcasted works to the public through amplifiers or other similar means of transmitting symbols, sounds, and images, but doesn't include the rights specified in Item 12 of this clause". Participants in the legislative amendment also state that "This amendment has modified the concept of the right of broadcasting, so that broadcasting is no longer limited to wireless transmission, but also includes wired transmission of works directly".[3] Therefore, all non-interactive communication will be adjusted by the right of broadcasting in the future, while interactive communication will be controlled by the 12th right — the right to information network communication.

However, as mentioned above, broadcasting has specific communication technology requirements, and international conventions also have specific references to the behaviors controlled by the right of broadcasting, namely wireless transmission in the form of electromagnetic waves, which is characterized by active signal transmission and passive reception. Therefore, the selection of wording for this right is very inappropriate. Covering all non-interactive communication behaviors with the highly technical term "the right of broadcastings" can easily create obstacles to understanding in institutional communication. In other words, the term "the right of broadcasting" simply can't cover diverse modes of communication. In the English translated texts of several new laws inquired by the author, the modified "广播权" is all translated as "the right of broadcasting".¹² In both international conventions and general English semantics, "broadcasting" refers to the transmission method of radio transmission and the selection of this term may cause misunderstandings in institutional communication.

12. The author has inquired the English version of "Copyright" revised in 2020 in the Peking University Fabao Database, and the translation of "广播权" in Article 10, Paragraph 1, Item (11) is "the right of broadcasting". The English translation provided by Queen Mary Journal of Chinese Commercial Law is also "the right of broadcasting", available at: <https://mp.weixin.qq.com/s/LiNM08rZJfheS5dfrys48g>, last access time: March 20, 2023.

3. THE SYSTEM OF COMMUNICATION RIGHTS IN INTERNATIONAL CONVENTIONS AND ITS CORRESPONDENCE TO CHINA'S THE RIGHT OF BROADCASTING

The third revision of the Copyright Law retains the legislative model of regulating the use of terminal devices to play works through the right of broadcasting in previous legislation. In international conventions, this behavior is qualitatively different from the communication of works through "wired or wireless means". The use of "the right of broadcasting" to refer to two different types of behavior misunderstands the original meaning of the convention and is not conducive to the systematic construction of the right to communication.

3.1 Public Communication in International Conventions Refers to On-site Communication

In copyright property rights, there is a type of right to control the "non-material exploitation" of a work,[4] known as the right to communication, aimed at "including consumers who can enjoy the work without relying on its attachments".[5] The usage behaviors of works controlled by rental and distribution rights must be based on the possession of the material carriers of the works, and therefore don't fall within the scope of the right to communication. "Most countries, including China, have subdivided the right to communication into multiple exclusive rights",[6] but there are differences in the classification criteria and specific types of rights. The right to communication in China's Copyright Law includes exhibition rights, screening rights, performance rights, broadcasting rights, and information network communication rights. Whether it is an on-site exhibition or screening, or the communication of works through information networks, the public doesn't need to rely on the original or copies of the works to achieve appreciation. International conventions have relatively clear standards for dividing the types of work communication rights, distinguishing between public communication and communication to the public based on whether the communication occurs on-site or requires transmission. In the Berne Convention, public communication is aimed at the public present. For example, if a song is played through an amplifier, the public must be

within the geographical range of the amplifier in order to appreciate the work, the source of communication is the receiving terminal, and the location where the communication occurs is the same as the location where the public receives the work. Communication to the public involves the transmission of the work, which starts from a location that is not the same as the location where the work is received by the public, such as transmitting the work to a location where users can receive it through broadcasting, cable, or the Internet. Therefore, whether there is a need for transmission is the standard for distinguishing between public communication and communication to the public, and the wording used in the Berne Convention to express various communication rights reflects this division. However, due to the limitations of treaty making technology, the convention fails to integrate the same rights, but rather dispersedly stipulates them in different clauses. The phenomenon of different types of rights included in the same clause can be seen everywhere in the convention.

For example, Article 11 of the Berne Convention stipulates the rights of authors of plays and musical works, and its Paragraph 1, Item 1 stipulates that authors have the right to "authorize public performance of works, including public performance through various means and methods", where public performance refers to live performance by behaviors, and "public performance through various means and methods" refers to the use of equipment to play a performance, such as playing a music album tape on a recorder in public, commonly known as mechanical performance.[7] Therefore, Item 1 stipulates the author's right to control on-site performance and mechanical performance through on-site communication rights. Item 2 of this clause stipulates that the author has the right to "authorize the performance of the work for communication to the public through various means", and the right for communication to the public refers to remote transmission to non-communication locations in the treaty. Therefore, Item 1 and Item 2 of this clause stipulate completely different types of rights, which belong to on-site communication and remote transmission. Similarly, the Berne Convention adopts similar legislative techniques in Article 11 (2) to regulate the Broadcasting and Related Rights enjoyed by authors of literary and artistic works. Paragraph 1, Item 1 of this article stipulates that the author has the right to "authorize the broadcasting of its works or the communication of its works to the public

through any other wireless transmitting symbols, sounds, or images". As mentioned earlier, broadcasting refers to the transmission of sounds or images through electromagnetic waves without the use of any artificial auxiliary or supporting means.[8] Therefore, the communication method specified in Item 1 belongs to remote transmission. Item 2 of this clause stipulates that the author may authorize another institution other than the original broadcasting institution to communicate the broadcasted works to the public through wired transmission or rebroadcasting, which also belongs to remote transmission. "The public communication of broadcasted works through amplifiers or other similar means of transmitting symbols, sounds, and images" in Item 3 of this clause belongs to on-site communication behavior, which is completely different from the nature of the first two provisions. For example, supermarket and other business premises broadcast TV dramas broadcasted by television stations through television, and since the supermarket itself doesn't carry out remote transmission, it only uses broadcasting equipment to provide live broadcasting of film and television works to the public, which doesn't belong to remote transmission. The Guide to Copyright and Related Rights Treaties Administered by the World Intellectual Property Organization also points out when interpreting the "public communication" in Article 11 (2), Paragraph 1, Item 3 of the Berne Convention that "It is appropriate to use this term without using 'communication to the public', as this behavior doesn't involve transferring the work to another location. It is carried out in a location where the public is present or may be present. Therefore, in this sense, it is similar to 'public performance' and 'public recitation'".[9] Therefore, the public communication in the Berne Convention has a specific reference, referring to the communication behavior aimed at the on-site public and not involving remote transmission.

There are not many legislative examples that directly use "the right of broadcasting" as the title of a right, and Germany is one of them. The right of broadcasting in its copyright legislation refers to the "right to provide works to the public through radio and television transmission, satellite transmission, cable transmission, or similar technological means".¹³ German scholar Reh binder also pointed out that the behavior of receiving programs through terminal receiving devices doesn't fall within the

13. Copyright Act of (Copyright Act, last amended by the Law of 23 June 2021), § 20, Broadcasting Rights.

scope of this right when discussing the right of broadcasting in Germany copyright legislation.[10] However, when referring to Article 11 (2), Paragraph 1 of the Berne Convention, which stipulates the right of broadcasting, China fails to distinguish between the two types of communication behaviors, but includes all three types of communication behaviors in that clause in "the right of broadcasting". Therefore, the right of broadcasting in China's Copyright Law not only controls remote transmission behavior, but also controls specific on-site communication behavior.

3.2 The Term "Communication to the Public" in International Conventions Refers to Remote Transmission

The term "communication to the public" used in international conventions to describe the behavior controlled by various communication rights refers to the behavior of transmitting works to the public outside the place of origin of the communication, which is different from public communication that controls on-site communication. The description of the three types of communication behaviors in Article 11 (2) of the Berne Convention on Broadcasting and Related Rights reflects this distinction in the treaty. In description of rights in Item 1, the author has the right to "authorize the broadcasting of its works or the communication of its works to the public through any other wireless transmitting symbols, sounds, or images" and Item 2, the author has the right to "authorize another institution other than the original broadcasting institution to communicate the broadcasted works to the public through wired transmission or rebroadcasting", what is combined with "broadcasting", "wireless transmission", "wired transmission", and "rebroadcasting" is "communication to the public". The common feature of both wireless broadcasting and wired re-communication of received signals is the remote transmission to the public who is not at the place of origin of the communication. Therefore, the term "communication to the public" used in the convention is different from on-site communication to the public.¹⁴ In addition, Article 14 of the

convention stipulates that authors of literary and artistic works have the right to communicate their works adapted into films to the public through cable, and here, in conjunction with "cable", "communication to the public" is used. Authoritative works on copyright international treaties also point out that "Since the term 'communication to the public' is used in conjunction with terms such as 'through cable' in other articles, we can reasonably believe that the expression 'communication to the public' has the following implicit meaning: The public is not in the place of origin of the communication".[11]

However, the provisions of the Berne Convention regarding the right for communication to the public are very scattered, and not all types of works are entitled to the right for communication to the public. Moreover, the convention imposes specific communication technology restrictions on the right for communication to the public for certain types of works, resulting in gaps and omissions of rights. For example, Article 11, Paragraph 1 stipulates that the authors of plays, musical and dramatic works, and musical works have the right to "authorize the use of various means to communicate the performance of the works to the public". The expression of "various means" has technological neutrality and can leave explanatory space for new modes of communication, such as Internet communication to be included in the scope of protection required by treaties. However, this clause only applies to "plays, musical and dramatic works, and musical works", and these works must be performed. Therefore, if a work doesn't belong to the category of work specified in this clause or has not been performed, protection can't be obtained by relying on the broad right to "communicate to the public through various means". Article 11 (2), Paragraph 1 is relatively broad in terms of the types of works targeted by Broadcasting and Related Rights, which stipulates that all "Authors of literary and artistic works shall have the following exclusive rights", but the provisions of this clause regarding communication to the public have special communication technology requirements, that is, the initial communication must be through broadcasting or other wireless means, and direct transmission through wired means doesn't fall under the protection required by this clause. If the lyrics of a song or a work of art are directly transmitted through wired means, the convention can't provide any form of protection for these works as they have

14. In Article 11 (2), Paragraph 1, Item 3 of the Berne Convention, it uses the term "public communication" to describe the behavior of broadcasting a received broadcast on site. It can be seen that the convention uses "communication to the public" to refer to remote transmission and "public communication" to refer to on-site communication. Refer to Article 11 (2), Paragraph 1, Item 3: "Authorize the public communication of broadcasted works through amplifiers or other similar means of transmitting symbols, sounds, and images".

not been performed and are initially transmitted through wired means.

With the development of Internet communication technology, interactive communication has become an important way to obtain works and it has also brought challenges to copyright protection. Countries have provided different solutions on how to incorporate this new mode of communication into the protection scope of international conventions. It is not appropriate to incorporate this interactive communication into the protection of the Berne Convention by interpreting its right for communication to the public. On the one hand, not all types of works have the right for communication to the public. On the other hand, the "Broadcasting and Related Rights" clause, which protects a wide range of types of works, has specific requirements for communication technology. If the initial communication is carried out through cable, there are obstacles that can't be explained into the terms of this right. In the end, countries have filled the loopholes in the provisions of the Berne Convention on the right for communication to the public by concluding a new international treaty — the WIPO Copyright Treaty (WCT).¹⁵ As a special agreement under the Berne Convention, WCT extends the right for communication to the public to all types of works through the "umbrella-type solution", and doesn't distinguish between communication technologies, including both wired and wireless communication within the scope of control of rights. WCT stipulates in Article 8 "The Right for Communication to the Public" that, "Without prejudice to Article 11, Paragraph (1), Section (ii), Article 11 (2), Paragraph (1), Sections (i) and (ii), Article 11 (3), Paragraph (1), Section (ii), Article 14, Paragraph (1), Section (ii) and Article 14 (2), Paragraph (1) of the Berne Convention, authors of literary and artistic works shall have exclusive rights to authorize the communication of their works to the public through wired or wireless means, including making their works available to the public, so that members of the public can access them at places and times of their personal choices". Among them, in Article 11 (2) of the Berne Convention, Broadcasting and Related Rights, the third type of communication behavior stipulated in Item 1, namely the broadcasting received through the receiving device, is not included in Article 8, the right for communication to the public, of the WCT, which also indicates that the convention

15. WIPO Copyright Treaty, abbreviated as WCT.

intends to distinguish between public communication and communication to the public, and doesn't consider this broadcasting behavior to be a remote transmission behavior regulated by the right for communication to the public.

3.3 The Misalignment of Wording in the Right of Broadcasting and the Complication of Rights in the New Law

The revised Copyright Law states the right of broadcasting as "the right to publicly communicate or rebroadcast works through wired or wireless means, as well as the right to communicate broadcasted works to the public through amplifiers or other similar means of transmitting symbols, sounds, and images".¹⁶ The first half of the section "communicate works by wired or wireless means" is a provision for remote transmission; however, the term "public communication", rather than "communication to the public", is used in conjunction with it in legislation. In the latter part, the wording of "communicate to the public" is used when describing the use of playback devices to restore the received broadcasted works. This means that the meaning of public communication and communication to the public in the revised Copyright Law is completely opposite to international conventions. If Chinese legislation does intend to use public communication as a reference for remote transmission and use communication to the public to refer to on-site communication, in addition to potentially causing misunderstandings during external communication (which can also be clarified through interpretation), it doesn't violate international conventions. Because the conventions only require the level of copyright protection that each country should achieve, there is no need to consider how to implement the conventions through domestic laws. For example, Article 8 of the WCT stipulates the right for communication to the public, and the latter part specifically mentions that this exclusive right should "include making their works available to the public, so that members of the public can access them at places and times of their personal choices". The European Union (EU) has therefore formulated the Copyright Directive on the Information Society and fully regulated the right for communication to the public in WCT.¹⁷ Some EU member states have

16. Article 10, Paragraph 1, Item (11) of the Copyright Law of the China (2020 Amendment).

17. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the characterization of

accordingly revised their domestic legislation to introduce neutral provisions on the right for communication to the public. The United States doesn't fulfill its treaty obligations by amending legislation, but achieves the level of protection required by the conventions by interpreting distribution rights, performance rights, and display rights.[12] China has adopted an "additional" approach, regulating interactive communication through the provision of information network communication rights in accordance with the second half of Article 8 of the WCT during the revision process of the Copyright Law in 2001. But the key issue is that within the Copyright Law, the same term refers to different ways of communication, and the term used to express the same nature of communication rights of different rights subjects is also vastly different and not uniform. For example, when regulating performers' information network communication rights, the wording is "permit others to communicate their performances to the public through information networks".¹⁸ Here, the term "communicate to the public" refers to remote transmission through information networks, which is completely opposite to the on-site communication behavior controlled by 'communication to the public' in Article 10 of the copyright owner's right of broadcasting. In the same legislation, the meanings represented by the same terms are different, which will bring obstacles to the understanding and interpretation of the law, and is a manifestation of insufficient legislative systematization.

In addition, the modified right of broadcasting still controls the behavior of "communicating works broadcasted to the public through amplifiers or other similar means of transmitting symbols, sounds, and images". In the Berne Convention, this behavior doesn't belong to remote transmission, but rather belong to on-site communication at the place of communication. It is worth noting that the legislation only includes the behavior of receiving "broadcasting" that are played through terminal devices such as amplifiers and projectors. According to the interpretation of the amendments made by the participating legislators, this controls the behavior of "communicating works through means such as broadcasting by radio and television stations through tools such as amplifiers".[13] According to the definition, only the broadcasting

of "radio, television station" received through terminal devices belongs to the scope controlled by the right of broadcasting. If the content is played through non-interactive means obtained through the network, does it belong to the scope of right of broadcasting? As mentioned above, after the third revision of the Copyright Law, the means of communication referred to as "broadcasting" have been expanded, and all non-interactive communication will be considered as "broadcasting" behavior. Therefore, using terminal devices to display works that are webcast or scheduled to be played online to the public should also fall within the scope of adjustment of right of broadcasting.

The problem lies in the fact that the Copyright Law also stipulates the performance rights and screening rights in the design of rights to control on-site communication behavior. In China's Copyright Law, one of the behaviors controlled by performance rights is "publicly broadcasting the performance of works through various means". According to legislators' interpretation, this communication behavior belongs to mechanical performance. The screening rights control "the rights to publicly reproduce art, photography, audio-visual works, etc. through projector, slide projector and other technical equipment".¹⁹ From the nature of their behaviors, both have homogeneity and belong to on-site communication aimed at the public. The difference between the two lies in that the on-site communication content, as the performance rights, must be a "performance of the work". If an unperformed work is played, such as using a projector to play a movie, it doesn't belong to a "mechanical performance" of the work, but should be considered as screening of the work. The criteria for determining whether the on-site communication of a work falls within the scope of performance rights or screening rights are relatively clear if they are based solely on whether the work has been performed or not. However, when the right of broadcasting includes the use of receiving equipment to broadcast the work received through broadcasting, there is another standard for determining which right control scope the on-site communication behavior belongs to — the method of obtaining the work. If the work played on site is obtained through interactive means, it will be controlled by screening rights or performance rights. If obtained through non-interactive means, it will

certain aspects of copyright and related rights in the information society, Article 3 (1).

18. Article 39 of the Copyright Law of the China (2020 Amendment).

19. Article 10, Paragraph 1, Item (10) of the Copyright Law of the China (2020 Amendment).

be adjusted by the right of broadcasting. For example, the hotel provides a projector connected to the Internet, allowing customers to play works obtained through the Internet at a time of their choice. The court finds that the hotel's actions constitute an infringement of the film screening rights.²⁰

Therefore, the provisions of the third Copyright Law on the right of broadcasting have gone through the same path of technological non-neutrality: For works that are also played using amplifiers or video playback devices, the display of content obtained through non-interactive means falls within the scope controlled by the right of broadcasting; if it is the broadcasting of a work received through the information network in an interactive manner, it is recognized as performance rights or screening rights, and the design of this right itself is not reasonable. Since they all belong to the on-site communication of works, distinguishing the types and acquisition methods of works and stipulating different types of rights will only increase the difficulty of behavior nature determination and contract design, and will not be helpful for the protection of rights and the systematization of communication rights, provided that there is no difference in the means of communication and the scope of legally preset communication. For example, as a product of the application of tri-networks integration technology, the Internet protocol television (IPTV) can not only receive in real time and replay programs broadcast by TV stations, but also acquire and broadcast the content on the Internet according to the time and place selected by users. When others use IPTV to broadcast works to the public through non-interactive means (such as real-time broadcasting by television stations or webcasting, or online set-time broadcasting), the on-site communication of such works is controlled by the right of broadcasting. When using IPTV to broadcast works obtained through interactive means, it may constitute an infringement of screening rights or performance rights. In practice, it has become common for hotels and other service venues to provide IPTV services to customers. However, the current legislation distinguishes the source and type of works obtained, and stipulates different types of on-site communication rights, which increases the difficulty of determining the rights of broadcasting service providers such as hotels as well as design of

contract. In the future, it should conform to the development trend of technological convergence of communication and integrate the scattered on-site communication rights in the current legislation.

4. DISCUSSION ON THE LEGISLATION OF IMPROVING THE RIGHT OF BROADCASTING

In the newly revised China's Copyright Law, the right of broadcasting includes both remote transmission and live broadcasting of received broadcasts, thereby expanding the control scope of the right of broadcasting and highlighting the qualitative nature of communication behaviors and the obstacles to the systematization of the right of broadcasting in the context of tri-networks integration. Such modifications stem from misunderstandings about international conventions and can easily lead to misunderstandings in foreign exchanges. In this regard, this article proposes two suggestions for revision. Firstly, in future revisions, "the right of playing" should be used instead of "the right of broadcasting". Secondly, it is needed to delete on-site communication and only retain remote transmission, in order to reduce the problem of weak awareness of distinguishing communication types caused by legislative confusions.

4.1 The Wording Modification of the Right of Broadcasting

As discussed earlier, broadcasting in international conventions specifically refers to remote transmission through wireless means, and accordingly, the right of broadcasting controls the transmission behaviors through wireless means. Both broadcasting and the right of broadcasting are products of communication technology in a specific historical period, with a strong color of technicism. For example, in the Berne Convention, the right of broadcasting can't cover the direct transmission of works in a wired manner. Essentially, whether it is wired or wireless transmission, the effect is to break through the spatial limitations of work communication and transmit the work to geographically dispersed audience, with the same impact on rights holders. Therefore, using "broadcasting" as a specific communication technology to limit the scope of rights is constrained by the development of communication technology and legislative level in a specific period, which is not reasonable today. Therefore, subsequent treaties such as WCT have abandoned

20. See ZMZ No. 1050 Judgment of Zhejiang Provincial Higher People's Court (2022).

this technology limited right design path and instead adopted a neutral "right for communication to the public" to control remote transmission behaviors. The advantage of this legislative technique is that it is not affected by changes in communication technology, and it is reasonable to describe the scope of right control based on the characteristics and effects of communication behaviors. During the revision process of China's Copyright Law in 2020, the control scope of the right of broadcasting was expanded. However, as mentioned above, choosing "the right of broadcasting" as the reference for non-interactive communication is not reasonable, and the international community has formed a relatively consistent and fixed understanding of the meaning of broadcasting. China's adoption of this highly technical and historical term to cover non-interactive communication with richer connotations may lead to misunderstandings in foreign exchanges.

Besides, the provisions on the right of broadcasting in international conventions only refer to remote transmission through wireless means. Although the Berne Convention also stipulates in Article 11 (2), Paragraph 1 the behavior of re-communication through wired and wireless means, as well as the broadcasting of works through receiving devices, this belongs to the "Related Rights" in the "Broadcasting and Related Rights" section of the convention. When China revised the Copyright Law in 2001, referring to Article 11 (2), Paragraph 1 of the convention, it included all three types of behaviors in "Broadcasting and Related Rights" in the right of broadcasting, which also led to the scope controlled by China's right of broadcasting exceeding the provisions of the convention, being actually a misunderstanding of the convention. After the amendment of the law in 2020, the types of behavior controlled by the right of broadcasting were expanded, further exceeding the commonly understood communication behaviors that the right of broadcasting could encompass. Therefore, in the future revision process of the Copyright Law, the use of the concept of "the right of broadcasting" should be abandoned.

Several draft texts released during the third revision of the Copyright Law showed that there had been plans to replace "the right of broadcasting" with "the right of playing", but ultimately the legislation chose to retain the title of

right of broadcasting.²¹ Compared to "broadcasting", the term "playing" itself doesn't refer to a specific communication technology and can be used as a general term for non-interactive communication. For future revisions to the Copyright Law, it is recommended to use the term "the right of playing" instead of the term "the right of broadcasting" in current legislation.

4.2 Limitation of the Scope Controlled by the Right of Broadcasting

The third revision of the Copyright Law expanded the scope controlled by the right of broadcasting, including all behaviors of "public communication or rebroadcasting of works through wired or wireless means". In the future, non-interactive communication through broadcasting, cable, or the Internet will be protected through "the right of broadcasting". At the same time, the right of broadcasting also retains the provision of "communicating works broadcasted to the public through amplifiers or other similar means of transmitting symbols, sounds, and images". However, only the live broadcast of works received through "broadcasting" is considered a behavior controlled by the right of broadcasting; if the played work is obtained through interactive means, it will be considered to fall within the scope controlled by other rights. The key is that in response to the behavior of on-site communication, how the work is obtained has no significance in determining the behavior. For those who receive works and use audiovisual devices for playback, their behaviors are only the behaviors of disseminating the works to the public on site at the receiving location. It is not reasonable to differentiate and characterize behaviors based on whether the work is obtained through interactive means. The meaningful basis for classification should be the characteristics, effects, and impact on the rights holders of the communication behavior. In the context of tri-networks integration, works can be obtained interactively or in a non-interactive manner through a single device and played back. In

21. The Copyright Law of the China (Revised Draft) issued by the National Copyright Administration on March 31, 2012 had the following provisions: "The right of playing, that is, the right to play a work to the public or to replay the work in wireless or wired mode, and the right to communicate the playing of the work to the public through technical equipment". Afterwards, in the draft texts published in July 2012, January 2013, and June 2014, although the wording was adjusted when expressing the content of the rights, the term "the right of playing" was adopted. However, the draft text published in April and August 2020 still used "the right of broadcasting".

this situation, distinguishing the source of works and stipulating different types of rights for the on-site communication of works will increase the cost of determining rights, and the unnecessary complexity of legislation may affect the realization of legal effects.

As mentioned earlier, the behavior of using playback devices to communicate received works on site falls within the scope of the "Broadcasting and Related Rights" in the Berne Convention, and China's inclusion of it in the right of broadcasting provision is a misunderstanding of the convention. Germany, as one of the few countries that has established the right of broadcasting, has not included the behavior of broadcasting works on site through receiving devices. When the Copyright Law is revised again in the future, the provision of "communicating works broadcasted to the public through amplifiers or other similar means of transmitting symbols, sounds, and images" in the current legislative right of broadcasting should be deleted, so as to maintain the simplicity of non-interactive communication of this right and integrate the performance rights and screening rights into one on-site communication right, achieving clear boundaries between various rights, and reducing the cost of right confirmation for on-site communication of works in the context of tri-networks integration through scientific legislation.

5. CONCLUSION

In international copyright legislation, "broadcasting" refers to a specific transmission method. The third revision of the Copyright Law has expanded the control scope of the right of broadcasting, which is different from the general understanding of broadcasting in the international community and may lead to misunderstandings in foreign exchanges. In addition, the legislative model that stipulates both remote transmission and live broadcasting of received broadcasts in the right of broadcasting stems from misunderstandings of international conventions, and also poses obstacles to the systematization of communication rights and the accurate nature determination of various communication behaviors in practice. In the context of tri-networks integration, this issue will become even more prominent. For example, regarding the nature determination issue of the hotel providing viewing equipment and users using the equipment to log in to video websites to watch on-demand audio-visual works, some courts believe that the hotel's behavior constitutes an infringement of the

rights holder's right to information network communication,²² while others believe that the hotel didn't implement the behavior of placing the works on the Internet, but only provided devices that could connect to the Internet, reproducing the involved works to the public, thus constituting an infringement of the screening rights.²³ This nature determination debate reflects the lack of ability to distinguish between live broadcasting and remote transmission in practice. When hotels only provide screening equipment to allow the public to view works obtained through various means, the type of rights involved may only be live broadcasting rights, not remote communication rights. In the future, the revision of the right of broadcasting should remove the relevant regulations on on-site communication and only retain the regulatory type of remote transmission, in order to reduce the problem of weak awareness of differentiation of communication types caused by legislative confusions.

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22. See J 0491 MC No. 11388 Judgment of Beijing Internet Court (2021).

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