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ARTICLE

Copyright Law in the European Union, the United States and China

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Abstract This study juxtaposes copyright law in the European Union (EU), the United States (US) and the People's Republic of China (China). After mapping major differences and similarities in copyright law between the three jurisdictions, possible reasons will be explored for the divergence and convergence detected. Findings indicate that many of the similarities as well as differences in copyright law can be attributed to international harmonization and, more specifically, to the Berne Convention. Convergence, both through congruence and pressure, and economic concerns explain why China's copyright law has become strikingly similar in recent decades to copyright law in the EU and the US, despite vast historical and cultural differences. The differences are due, *inter alia*, to the underlying theoretical differences in copyright doctrine and different underlying aims of copyright protection, resulting in differing stances on the role and existence of moral rights. The divide between common law and civil law with regard to the role of statutory law and case law, respectively, is also relevant. Surprisingly, although China leans more towards the civil-law end of the continuum between civil law and common law, the underlying rationale for copyright and the role of precedent show some traits central to a common-law country, bringing China in those respects closer to the US than to the EU. However, like most EU Member States, but unlike the US, China recognizes the existence of moral rights, as required by the Berne Convention.

Keywords Copyright law · Copyrights · IP law · Comparative law · Comparative IP law

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1 Introduction

Perhaps surprisingly, today's national copyright laws share striking structural similarities despite differences arising from distinct legal systems and historical development.[1] This study looks at copyright law in a comparative context. Although the details of the legal regulation of copyright are a matter for national legislatures, some fundamental features of copyright are to a great extent shared by all the EU Member States, the US and even the rest of the world, including China. Copyright refers to an incorporeal statutory right that grants the author of an artistic work, for a limited period, the exclusive privilege of making copies of the work, and publishing and selling those copies.[2] To receive copyright protection, works need to have some degree of creativity or originality.[3] Equally fundamental to copyright protection in most countries is the notion that copyright only extends to creative expression originating from an idea: the idea itself is excluded from the scope of copyright protection.[4] Although there are specific universal norms regarding the recognition and protection of copyright in the EU, the US and China, each system has its own nuances that will be analyzed and compared in this study.

I will juxtapose the legislative framework of copyright law in the European Union (EU), the United States (US) and the People's Republic of China (China). The research question of this study is to explore *to what extent the copyright regimes in the European Union, the United States and China resemble each other and to what extent they differ?* The core aim of the study then is simply to map out similarities and differences in the objectives and means of copyright in these three jurisdictions. To do this, I first present each copyright regime, with the caveat that only some of the main features of that particular field of law in the chosen jurisdictions will be compared, in order to keep the focus of this study on synthesis rather than on an all-encompassing description of copyright law. In addition to detecting differences and similarities in copyright law between the EU, the US and China, I address the following related research question: *What possible factors explain the similarities and differences in copyright law between the European Union, the United States and China?* Whereas the first research question mainly focuses on *what* the differences and similarities are, the second research question is about *why*, specifically what factors might explain the answers to the first research question.

Although much literature has focused on comparing certain aspects of copyright law or policy in different jurisdictions, there has been a scarcity of studies scrutinizing copyright law as a field of law, that is to say summarizing the main tenets of copyright law in jurisdiction A in order to compare them with those in

[1] Kur et al. (2019), p. 288.

[2] *Ibid.*

[3] *Ibid.*

[4] *See* Guide to the Berne Convention (1978) 2.3; Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh, Morocco, 15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 321 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (hereinafter "TRIPS Agreement"), Art. 9(2).

jurisdictions B and C, followed by an analysis of the divergence and convergence of copyright law in jurisdictions A, B and C.[5] Moreover, many of the previous studies involving China's copyright law have chosen to compare only two jurisdictions, typically conducting EU-China or US-China comparisons.[6] This groundbreaking study sheds light on previously unanswered questions by exploring similarities and differences in copyright law between the EU, the US and China. The main contributions made by this study include systematizing the commonalities of and differences between copyright law in the EU, the US and China, with an emphasis on attempting to explain the findings by drawing on the pool of possible explanatory factors at play. The study also aims to enrich comparative legal scholarship, which has an abundance of theory, by conducting a rigorous hands-on legal comparison. I find that many of the similarities as well as the differences in copyright law can be attributed to international harmonization efforts and, more specifically, to the Berne Convention. Convergence, both through congruence and pressure, and economic concerns explain why China's copyright law – at least as "law in books" – has become strikingly similar in recent decades to copyright law in the EU and US, despite vast historical and cultural differences. The differences are due, *inter alia*, to the different copyright doctrine and different underlying aims of copyright protection, which result in different stances on the role and existence of moral rights. The divide between common law and civil law with regard to the role of statutory law and case law respectively is also of relevance. Surprisingly, although China leans more towards the civil-law end of the continuum between civil law and common law, the underlying rationale for copyright and the role of precedent show some traits central to a common-law country, bringing China in that respect closer to the US than to the EU. However, like most EU Member States, but unlike the US, China recognizes the existence of moral rights, as required by the Berne Convention.

In seeking answers to the research questions, this study makes use of the methodological and theoretical freedom inherent in today's comparative law to adopt a customized approach while adhering to the basic approach of the comparative legal method as described by the pioneering comparatist Schlesinger, that is to say identifying similarities and differences and attempting to explain the reasons for them.[7] It follows that, in carrying out the comparison, I will to a great extent follow Siems' four-phase model of steps for conducting a comparative study.[8] Having first decided on the research questions and the legal systems to be compared, I will describe some major characteristics of copyright law in the EU, the US and China, concentrating on authoritative written texts from all three jurisdictions. The data compared will consist of an overview of statutory law in

[5] For such comparative legal research, *see*, *e.g.* Zhang (2022), who examines copyright and patent law in the US, the EU, and China.

[6] For an example of research comparing only two jurisdictions and a specific aspect of copyright law, *see* Lundstedt's (2016) study, in which she investigated the principle of IP territoriality in the resolution of trans-border IP infringement suits in the EU and the US.

[7] Schlesinger (1995), p. 477. *See also* Sacco (1991), pp. 4–6.

[8] Siems (2022), p. 15.

each jurisdiction, complemented by an analysis of relevant court cases. To complement our understanding of copyright law while avoiding the pitfall of reducing the analysis to mere case-law journalism, I will also review legal research on copyright doctrine in the EU, the US and China.[9] The description of the laws will be followed by a comparison of the laws in all the jurisdictions. This study presumes a certain level of knowledge about EU, US and Chinese contexts. This necessary insight into the legal systems, history, and politics of the EU, US and China can be gained by familiarizing oneself with more general works on those jurisdictions.[10]

After describing copyright law in the EU, the US and China, I will explore possible reasons for the similarities and differences detected. In the spirit of the methodological freedom of modern comparative law, the research design of this study does not directly emulate any particular previous study, but does follow Siems' model, as described above. However, for the design of this study, I have been inspired by the comparative study by Tolonen, a Finnish legal scholar specializing in commercial law, that juxtaposed legislation on the limited company in England, France and Germany.[11] Commonalities between this and Tolonen's study are to be found particularly in the part of his study in which he analyzed and systematized company law in the three chosen jurisdictions.[12]

The territorial scope of this study encompasses three prominent players of substantial size and importance on a global scale: the EU, the US and China: the "three global giants".[13] Today's standards of comparative law allow fruitful comparisons even between legal systems at different developmental stages.[14] However, the US legal system has been heavily influenced by the English common-law system, whereas individual EU Member States belong for the most part to the Romano-Germanic law or "civil-law" tradition.[15] To complicate matters, features of both common law and civil law are merged in EU law.[16] On the continuum from civil law to common law, China tends towards the civil-law tradition, although this

[9] *See* Schlag (2006), p. 821, who has heavily criticized US legal research for its excessive focus on commenting on judicial decisions. Van Gestel and Micklitz (2014), p. 298 have expressed concern that legal scholars in Europe run a similar risk of resorting to case-law journalism when it comes to CJEU case law.

[10] For a general overview of EU law, *see* Raitio and Tuominen (2020); Goebel et al. (2015); for the US, *see* Schoenbaum (2022); Fernholz and Collova (2022); and for China, *see* Chen (2021); Chow (2015).

[11] Tolonen (1974). Although Tolonen's work dates back some 50 years, it is a step ahead of many contemporary comparative studies that fall short of delivering rigorous comparison, in that it actually carries out an "apples to apples" comparison.

[12] However, one of the major differences in our research design is that Tolonen's work draws more heavily on legal theory and even legal philosophy when theorizing on the underlying ideal models of legislation to be compared.

[13] Hereinafter, "China" or "PRC" is used interchangeably in reference to the People's Republic of China to distinguish it from Taiwan, officially known as the Republic of China (ROC). The EU, the US, and China have been characterized as forming a complicated triangular relationship in the 21st century, *see* Gill (2008), pp. 270–286.

[14] Örücü (2006), pp. 444–445.

[15] I draw on the legal family taxonomy while recognizing that this classification is mostly an ideal instead of an accurate portrayal of legal reality; *see* Pargendler (2012), p. 1043.

[16] Raitio (2021), p. 537.

is a very crude characterization of China's legal system, as will be seen later. Belonging to different legal families has important ramifications for the legal/cultural features of these systems, as the legal system of common law is based on precedents that are binding in future decisions, whereas the content of the legal system of civil law stems from the norms of statutory, positive law.[17] This fundamental difference between common law and Romano-Germanic law will play an important role in this study, both when describing the legal framework of the EU, the US and China, and when attempting to explain the differences and similarities found.

Although Chinese law has been assigned numerous labels, including civil law, socialist law, and Confucian and East Asian law, these categorizations say little about the complex and multifaceted reality of China's laws.[18] De Cruz has warned against judging the Chinese legal system from an Anglo-European standpoint since blindly applying Western standards to an analysis of the Chinese legal system has in the past led to the misguided conclusion that China lacks a legal system.[19] In a similar vein, Ruskola has suggested that judging Chinese law by Western standards often leads to neglecting the vast discrepancy between law in action and law in books.[20] In describing how the European/US West has associated itself with law, and conversely, China with an absence of law, Ruskola has coined the notion of "Legal Orientalism".[21] More specifically, Legal Orientalism refers to intertwined narratives about what is and is not law, and who are or are not its proper subjects.[22] Legal Orientalism, or rather avoiding it, has implications for the subject matter of this study too, as falling prey to Legal Orientalism, idealizing US law and despising Chinese lawlessness could result in a biased comparison.

Including China, and especially China's copyright law, as the third subject for comparison poses both obvious and more subtle challenges. Alford has postulated that indigenous notions of intellectual property rights were nonexistent in China.[23] Alford's research has not been without its critics; for instance, Shao has argued that Alford's representations of Chinese law rely on stereotypical notions of Chinese culture, and disregard economic factors that were more influential in shaping intellectual property issues.[24] Thomas also found inconsistencies in Alford's arguments because her own research has indicated that Confucianism does not significantly influence IPRs in modern China.[25] All in all, there are strong

[17] Husa (2023), pp. 220–221.

[18] Chen (2010), pp. 159–181; Wolff (2018), p. 151 (analyzing why adopting the civil-law tradition rather than the common-law one was more suitable for the Chinese context; on Max Weber's misinterpretation and outright underestimation of Chinese law, *see* Marsh (2000), p. 281.

[19] De Cruz (2007), p. 223.

[20] Ruskola (2002), pp. 179–234. Others have also sided with Ruskola, saying that Western study of Chinese law is founded on a host of misinformed assumptions, *see*, for example, Clarke (1999), p. 53.

[21] Ruskola (2013), p. 5.

[22] *Ibid.*

[23] Alford (1995). For a critical evaluation of Alford's work, *see* Yu (2012).

[24] Shao (2005).

[25] Thomas (2017), p. 150.

arguments on both sides regarding the degree to which Confucianism has acted as an impediment to the adoption of a Western-style intellectual property rights system in China.[26]

With the risk of falling prey to ethnocentrism and Legal Orientalism, why even attempt to compare Chinese law with that of the EU and the US in the first place? Caught between Scylla and Charybdis in choosing whether to conduct comparative research doomed to be plagued with some degree of flawed representation of Chinese law or to abandon from the outset any attempt to compare China's copyright law with EU and US law (which in and of itself leads to ignorance rather than increased understanding of Chinese law by the West), I have opted for the first alternative. Despite the potential hazards mentioned here, China's "otherness" offers potential for a more nuanced comparison. This in turn gives impetus to the inclusion of China in this comparative legal study, metaphorically choosing Scylla over Charybdis. For instance, including China in the comparison might lead to more heterogeneous results, as China has gained a notorious reputation for having adopted a diverging outlook on the protection of IPR rights compared with the EU and the US.[27] Sacco has emphasized that it is possible to compare legal systems with different economic bases even if the systems appear dissimilar, because comparison measures differences, be they minor or major.[28] Lastly, because China has adopted many legal concepts, terminology and institutions of Anglo-European origin, how these legal transplants – or, in Teubnerian terms, "legal irritants" – have interacted with Chinese culture and tradition provides fertile ground for fruitful comparison.[29]

2 Comparing Copyright Law

The rationale for copyright protection has shifted from the initial emphasis on the investment made by publishers of printed books to the author.[30] However, even the rationale with a focus on the author is divided: the first rationale regards the work as

[26] I thank Samuli Seppänen for pointing out that even the very term of "Confucianism" is a Western construct (email from Samuli Seppänen to the author, 6 July 2022).

[27] *See* the study by Peng et al. (2017) on historical parallels between the current stance on IPR protection in China and the then developing US of the 19th century, which approved of widespread IPR violations. Drawing on this historical similarity, Peng et al. explore the intriguing question of why it might be in China's interest, akin to the US of the 19th century, to voluntarily improve its level of IPR protection. Yet we should be cautious to assume that historical patterns are bound to repeat themselves since the context of future events will never perfectly correspond to the circumstances of the past. On the interplay between history, repetition, and context, *see* Collier and Mazzuca (2006).

[28] Sacco (1991), p. 7.

[29] For more on China's evolving legal system, *see* Chen (2021), pp. 1–2. Teubner has proposed replacing the concept of "legal transplant" with "legal irritant" because, unlike what the legal transplant terminology implies, transferring something from one legal culture to another often triggers a chain of unintended and unexpected rather than controlled and predictable consequences, *see* Teubner (1998), p. 11. As with the term "legal family", I have decided to use "legal transplant" in this study while recognizing that it too is a flawed and contested term.

[30] Kur et al. (2019), p. 287.

emanating from the personality of its author, giving rise to both moral and economic rights (*droit d'auteur*). Another competing line of justification for copyright sees the works as the fruit of their author's labor.[31] As will become evident when reviewing EU copyright regimes, the *droit d'auteur* approach underlies copyright protection in most Continental European countries, whereas the latter approach is more prevalent in common-law countries.[32]

Intellectual property rights (IPRs) have traditionally been conferred under the national laws of individual states, with legal effects restricted to the territory of the conferring state and enforced by the courts of the conferring state, which apply domestic law. This concept is referred to as "IP territoriality" (often also referred to as "the principle of territoriality").[33] IP territoriality is a two-edged sword: while it preserves the freedom for a sovereign state to define its own IP laws and policies to reflect local values and interests, IP owners might find it burdensome to have their IP rights recognized and protected once the IP subject crosses the territorial boundaries of the conferring state.[34] To facilitate the acquisition and enforcement of IPRs outside the conferring states, states have been willing to surrender some degree of their sovereign power through international IP systems, initially through bilateral agreements in the 19th century, and then by IP conventions in the 19th and 20th centuries.[35]

Of these IP conventions, the Berne Convention is the most central international treaty governing copyright, with a foundational impact on several aspects of modern copyright law.[36] Although in-depth analysis of the Berne Convention is beyond the scope of this study, some key provisions will be presented here to provide sufficient context to understand how the copyright regimes in the jurisdictions compared reflect the provisions of the Berne Convention. The Berne Convention does not require registration for an author to receive copyright protection for their work; indeed, formal registration is explicitly prohibited.[37] The Berne Convention establishes the minimum duration of copyright as being 50 years after the author's death.[38] Protecting the moral rights of authors, in other words claiming ownership, objecting to mutilation, distortion, or other modifications of their works detrimental to the authors' honor or reputation, is established in Article 6^{bis}, a central and binding provision of the Convention for all its signatory states. This and several other provisions of the Berne Convention reflect the *droit d'auteur* approach.[39]

[31] *Ibid.*

[32] *Ibid.*

[33] For more on the principle of territoriality in the EU and the US, *see* Lundstedt (2016), who found that the principle of territoriality is interpreted differently in the US than in the EU.

[34] Pila and Torremans (2019), p. 32.

[35] *Ibid.*, pp. 28–29.

[36] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last amended, July 24, 1971 (hereinafter "Berne Convention"). The Berne Convention is administered by the World Intellectual Property Office (WIPO), an agency of the United Nations.

[37] Berne Convention, Art. 5(2).

[38] Berne Convention, Art. 7.

[39] Kur et al. (2019), p. 21.

Next, I turn to describing the main aspects of copyright law in the EU, the US and China. The description of laws is the second phase of the comparative method employed in this study. This enables the study to fulfill its two main objectives, namely to compare copyright law in the EU, the US and China, in order to identify commonalities and convergence between and among these systems and, even more importantly, to explain the differences and similarities found. The description will focus on the contours and nuances of respective copyright laws in the EU, the US and China.[40]

2.1 Copyright Law in the EU

From the outset, it can be acknowledged that there is no EU-wide copyright law; instead, copyright within the EU is a bundle of national laws.[41] Copyright has not traditionally been at the center of harmonizing efforts. This is because of barriers arising from differences in language and cultural traditions among the Member States as well as low economic potential to exploit copyright involving literary and artistic works in trans-border transactions.[42] However, recently, with more economic interests involved in copyrighted works thanks to computer programs, databases and new communication technologies, copyright has gained economic prominence and, simultaneously, has become an increasingly important part of EU law.[43] The EU has embarked on issuing regulations obligating its Member States to harmonize their copyright regimes.[44] It follows that EU copyright law, comprising harmonizing directives, is built on the provisions of the Berne Convention, to which all current EU Member States are signatories.[45] The overall architecture of copyright law in the EU is thus a product of multinational efforts to unify the different copyright regimes of the EU Member States. Since no EU-wide unitary copyright exists, the same copyrighted work receives protection according to the different national laws of each EU Member State.[46]

Article 2 of the Berne Convention protects literary and artistic works. These works include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression".[47] This definition

[40] More generally, on the evolution of copyright in a globalized world, *see* Hugenholtz (2018) and Gervais (2017).

[41] Kur et al. (2019), p. 294.

[42] *Ibid.*, p. 289.

[43] *Ibid.*

[44] Such directives include Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2002] OJ L 167/10 (hereinafter the "InfoSoc Directive").

[45] The Berne Convention has, as of the date of this study, a total of 181 contracting parties, *see* WIPO, "WIPO-Administered Treaties". https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15. Accessed 11 April 2023.

[46] Kur et al. (2019), p. 290. The European Copyright Code, developed by legal scholars across the EU, aims to serve as a model for the future harmonization or unification of copyright law at EU level, *see*: https://www.ivir.nl/copyrightcode/introduction/. Accessed 2 October 2022.

[47] Berne Convention, Art. 2(1).

encompasses works such as books, lectures, musical compositions, maps, plans and paintings, to name a few examples of protected works from Art. 2(1) of the Convention.[48] Derivative works, such as translations and other alterations of literary or artistic works, also receive copyright protection under the Convention.[49]

In recent years, the CJEU has taken an active role in furthering the harmonization of copyright at EU level through judicial interpretation concerning a fundamental principle of copyright, the originality requirement.[50] More specifically, in *Infopaq* and a series of subsequent cases, the CJEU harmonized the general criterion of originality as an "author's own intellectual creation" for all works in EU copyright law.[51] These rulings meant that the criterion of originality for copyright was not restricted only to computer programs, databases or photographs, as originally intended by the EU legislature.[52] These harmonization efforts by the CJEU serve as a prime example of the judicial activism that the CJEU has undertaken over the years to further the integration of the EU. Some observers have argued that the CJEU has been inspired by the US Supreme Court's contributions to nationalizing US politics by gradually reducing key aspects of the sovereignty of individual US states.[53]

The Berne Convention requires the term of copyright to last at least 50 years after the author's death, although a longer term is possible. The EU used the latter option to extend the duration of copyright to 70 years after the author's lifetime in the EU Copyright Duration Directive, which aims to harmonize the duration of copyright in EU Member States.[54] If the work has been created by multiple authors, the term of protection spans 70 years after the death of the last surviving author.[55] In general, national copyright laws of individual EU Member States do not require registration; copyright comes into existence without any formalities.[56]

EU copyright law includes a host of exclusive or "economic" rights connected to copyrighted works for authors as well as neighboring rights for those who have particular relationships with such works. These exclusive and neighboring rights contain such rights as the rights of reproduction, distribution, and communication to

[48] *Ibid.*

[49] *Ibid.,* para. (3).

[50] Rosati (2010), p. 816.

[51] Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* [2009] ECR I-6569, ECLI:EU:C:2009:465, para. 37; Case C-393/09 *Bezpečnostn softwarová asociace - Svaz softwarové ochrany v. Ministerstvo kultury* [2010], ECR I-13971, ECLI:EU:C:2010:816, para. 45; Joined Cases C-403/08 and C-429/08, *Football Association Premier League v. QC Leisure* and *Karen Murphy v. Media Protection Services* Ltd [2011] ECR I-09083, ECLI:EU:C:2011:631, para. 97.

[52] Art. 1(3) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version) [2009] OJ L 111/60; Art.3(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20 (hereinafter "the Database Directive"); and Art. 6 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L 372/12.

[53] Shapiro (1998), p. 34.

[54] Directive 2006/116/EC, Art. 1(1).

[55] *Ibid.*, Art. 1(2).

[56] Kur et al. (2019), p. 288.

the public, as well as the rights of rental and/or lending, broadcasting and computer program reproduction, distribution and rental on behalf of authors.[57]

In addition to economic rights, the copyright regimes of several EU Member States recognize the French and Continental European concept of copyright (*droit d'auteur*) – the natural rights perspective, which protects the artistic reputation of the creator of a work by prohibiting others from modifying or distorting the work without the permission of the author, even if the copyright has been transferred to another person or persons.[58] The moral rights can be separated into four distinct categories: Firstly, the right of integrity, under which the author can prohibit alterations to the work.[59] Secondly, the right of attribution or paternity, which means that the author can make the distribution of the work conditional upon his or her name being associated with the work. Thirdly, the right of disclosure, which means that the artist can prevent publication of the work until it meets the artist's own requirements.[60] Lastly, the right of retraction/withdrawal, under which, as the name suggests, the artist retains the right to withdraw the work.[61]

Individual EU Member States can determine whether they recognize moral rights, and if so, to what extent.[62] Since the extent of moral rights varies in different EU Member States, with countries such as France and Germany offering extensive protection of moral rights, while the Nordic countries impose only the minimum required by the Berne Convention, some legal scholars have called for a minimum harmonization of moral rights at EU level.[63] Others have foreseen that harmonization will be a challenge, as the moral rights theories underpinning copyright regimes in EU countries are internally inconsistent.[64] Other commentators have doubted the need for copyright harmonization across the EU, suggesting that moral rights and, in particular, the right of integrity, might be misused by artists, giving them abusive power over their work.[65] Interestingly, Dietz has postulated that the fair-use provision codified in Art. 107 of the US Copyright Act could be used as a model for harmonizing the right to integrity at EU level.[66] All in all, the debate over harmonization of moral rights at EU level is a controversial issue with valid arguments on both sides.

[57] The InfoSoc Directive, Arts. 2, 3, 4, 23; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [2006] OJ L 376/28, Art. 3 and Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version) [2009] OJ L 111/16, Art. 1.

[58] Hansmann and Santilli (1997), pp. 109–110. *See also* Berne Convention, Art. 6bis.

[59] Hansmann and Santilli (1997), p. 95.

[60] *Ibid.,* pp. 95–96.

[61] *Ibid.*

[62] The InfoSoc Directive, recital 19 of the preamble.

[63] Kelli et al. (2014), pp. 113–114.

[64] Masiyakurima (2005), p. 411.

[65] De Werra (2009), p. 281.

[66] Dietz (1994), p. 187.

Under EU copyright law, the first sale of the original or a copy of a work by the author or with his or her consent exhausts the right "to control resale of that object".[67] In addition to this exhaustion principle developed by the CJEU in *Deutsche Grammophon* and later codified in Art. 4(2) of the InfoSoc Directive, EU copyright law imposes other centralized limitations on copyright.[68] Although there is no "fair-use" doctrine akin to the US copyright doctrine, EU copyright law puts specific limitations on the exclusive rights of copyright by allowing unauthorized use of copyrighted works in the public interest for the purposes listed in Art. 5 of the InfoSoc Directive of advancing science, education and culture.[69] Examples of these limitations on copyright include, *inter alia*, reproduction for private and non-commercial use, use for illustration for teaching or academic research, and press reviews and news reporting.[70] Two mandatory text and data mining (TDM) exceptions to copyright protection were introduced in the Directive on Copyright in the Digital Single Market (DSM Directive) with the purpose of modernizing EU copyright law by catering more appropriately than the InfoSoc Directive to the emergence of the internet.[71]

Despite substantially harmonizing EU copyright law, 20 of the 21 exceptions listed in the InfoSoc Directive are optional, as Member States were not willing to abandon existing exceptions in their own national laws, meaning that the exceptions in Art. 5 are to a great extent a compilation of those found in the national copyright legislation of EU Member States.[72] This particular example, alongside impediments to harmonizing moral rights at EU level, reflects a more general tension in the EU between reconciling the aim of creating a unified, strong common internal market with piecemeal harmonization of copyright legislation and aligning the national interests of individual Member States. Neither of these objectives can be fully achieved without neglecting the other, as long as different national interests are at odds. However, recent crises such as the COVID pandemic and the war in Ukraine have shown that the national interests of EU Member States can be aligned rather rapidly when imminent action is called for under a common threat.

[67] The InfoSoc Directive, recital 28 of the preamble.

[68] Case C-78/70 *Deutsche Grammophon v. Metro SB* [1971] ECR 487, ECLI:EU:C:1971:59.

[69] The InfoSoc Directive, Art. 5.

[70] *Ibid.*, Art. 5(2), and (3)(a) and (c).

[71] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92 (hereinafter the "DSM Directive"). The TDM exceptions are enshrined in Arts. 3 and 4. For a critical evaluation of the two TDM exceptions, *see*, *e.g.*, Ducato and Strowel (2021). For a comparison of the DSM and the InfoSoc Directive, *see* Ferri (2021), pp. 23–24.

[72] Only temporary acts of reproduction; Art. 5 (1) of the InfoSoc Directive is mandatory. *See* Kur et al. (2019), pp. 316–317.

2.2 Copyright Law in the US

The authority of Congress in the United States to adopt a copyright law is laid down by the US Constitution.[73] The English mechanism of granting authors exclusive property rights was adopted by the US Constitution.[74] The first copyright statute was enacted by Congress in 1790 and, akin to the country's first patent statute, did not extend protection for works by foreigners but instead explicitly excluded them from its coverage.[75] Since the purpose of US copyright is to promote the progress of literary and artistic endeavor, adhering to the rationale for Anglo-American copyright tradition as utilitarian with the emphasis on economic rights, the author's natural rights tradition was not included in US copyright at its inception.[76] Perhaps somewhat surprisingly then, given the emphasis on market capitalism in US society, maximizing the financial gains of copyright owners is thus not the primary goal but rather a means to an end: allowing copyright owners to obtain a fair portion of their contribution to culture advances the common good by enriching that culture.[77]

The requirement of the Berne Convention to recognize moral rights was assumed for a long time to be the main reason why the US had not become a signatory.[78] However, in 1989, the US finally did ratify the Berne Convention, which requires its signatory states to impose minimal formalities and protect both economic and moral rights.[79] When ratifying the Berne Convention, the US Congress was hesitant to accept the moral rights part, arguing that its current state and federal law sufficiently satisfied Art. 6*bis* of the Berne Convention.[80] As the Berne Convention does not clearly articulate a method or require the implementation of specific laws to address

[73] Art. I, Sec. 8, states that "The Congress shall have power … [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries …"

[74] Other countries that have inherited their law from England, such as the United Kingdom, have also not recognized moral rights in their copyright laws, *see* August et al. (2013), p. 490.

[75] Hatch (1989), p. 172. The Copyright Act of 1790 has since been replaced by the Copyright Act of 1976. *See* Lee and Li (2023), p. 25 for historical parallels between China and the US; both were dependent on imported printed works in the early years of their copyright regime, leading to copyright legislation excluding foreign works from the scope of copyright protection.

[76] Bracha (2008), pp. 199–200; Kur et al. (2019), p. 8. *See also* Aoki (2006), p. 734, who lists four justifications underlying US IP laws. First and by far the most dominant justification is Jeremy Bentham's utilitarianism, which has the objective of maximizing utility for the greatest amount of people. Second, according to John Locke's labor-desert theory, IP rights are a desert for labor and creativity. Third, European *droit de suite* moral rights laws in particular derive their theoretical base from Hegelian "person" theory, which places emphasis on the personhood of the creator. Finally, the protection of "custom", with its origins in Scottish Enlightenment philosophy, has also left its mark on US IP laws, according to Aoki (2006).

[77] Samuelson (1993), p. 57. Samuelson's argument is closely aligned with what the father of modern economics, Adam Smith, says about the driving forces behind humans in his seminal work *The Wealth of Nations*. In this work, Smith famously argues that the self-interested individual paradoxically ends up serving the common good by catering to his/her self-interest: "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest".

[78] *See* Berne Convention, Art. 6^{bis}.

[79] Hansmann and Santilli (1997), p. 96.

[80] Berne Implementation Act of 1988, Pub. L. No. 100–568, 102 Stat. 2853 Sec. 13(a) (1988).

protection to comply with Article 6bis, the US, even after ratifying the treaty, has been hesitant to embrace the concept of moral rights.[81]

United States courts and legal writers have been of the opinion that moral rights do not and should not exist in the US.[82] Jaszi has criticized the author's natural rights tradition in US copyright doctrine, labeling such a view as "romantic authorship", an outdated pre-industrial tradition with excessive emphasis on the individual that is not in keeping with the demands of the modern marketplace.[83] Jaszi raised this criticism shortly after the US ratified the Berne Convention, which ended US isolationism.[84] Although his criticism of the US construct of authorship is well grounded, it overlooks important insights from the field of psychology and, more precisely, from self-determination theory. In short, according to self-determination theory, experimental studies show that humans are motivated not only by external rewards such as money or prestige but also by internal forces such as feelings of accomplishment.[85] In the domain of copyright, which is inherently about at least some degree of creative work, intrinsic motivational forces can be expected to influence creators. This would support the view of the natural rights tradition. The main argument here then is that, while authors of creative works protected by copyright may be also or even highly motivated by economic gains, it would be naive to reduce their work merely to serving an economic purpose, overlooking other central motivational factors at play. The argument then is that both natural rights and utilitarian perspectives in tandem provide a more holistic picture of authors' motivations.[86]

Under the 1976 Copyright Act, the broad reach of US copyright law extends to all works that are (1) original, (2) works of authorship, and (3) fixed in a tangible form of expression.[87] Although copyright protection has traditionally been associated with artistic endeavor, the requirement of originality should not be confused with novelty or aesthetic appeal.[88] Rather, originality entails that the material should be an independent product of the author rather than a copy or variation of an existing work.[89] Thus, the creativity component can be achieved by virtually any endeavor characterized by expressiveness.[90] Yet some creative spark is still required: in *Feist* the US Supreme Court held that telephone white page listings

[81] Holst (2006), p. 113.

[82] *Ibid.*, p. 105; Jaszi (1991), p. 500.

[83] Jaszi (1991), pp. 500–502.

[84] The US became a signatory to the Berne Convention in 1989, and Jaszi's publication came out in 1991. For a more recent critique questioning the appropriateness of moral rights in the US, *see*, for example, Adler (2009).

[85] Deci (1971); Ryan and Deci (2000).

[86] Naturally, depending on the context, some creators can be more driven by intrinsic versus extrinsic rewards, or vice versa.

[87] 17 USC Sec. 102(a). Federal copyright law is exclusive; there are no copyright laws enacted in different US states.

[88] Mtima (2008), p. 25; Bouchoux (2012), p. 193.

[89] Bouchoux (2012), p. 193.

[90] Adelman et al. (2015), p. 49.

did not qualify for copyright protection due to the absence of minimal creativity.[91] Expression that is rote, obvious, or merely mechanical in nature does not meet the criteria of creativity required for copyright protection.[92]

United States Code 17 (17 USC) Sec. 102(a) lists eight categories of works deemed as "works of authorship".[93] However, the list is to be understood as illustrative rather than exhaustive, because additional kinds of creative works can also be eligible for copyright protection.[94] The Copyright Act offers protection for works of authorship that are "fixed in any tangible medium of expression".[95] A work is "fixed" if it is embodied in a copy or phonorecord and is sufficiently permanent or stable to be perceived or communicated for more than a transitory period.[96] Examples of copies include famous photographs printed on a T-shirt or coffee mug, while a record or CD recording of a song by the Beatles counts as an example of a phonorecord.[97]

Under Sec. 102(b) of the Copyright Act, copyright protection does not extend to procedures, processes, systems, methods of operation, concepts, principles, or discoveries. Moreover, while 17 USC Sec. 102(b) protects an author's individual expression, it does not protect the underlying factual idea. This is commonly referred to as the "idea/expression" dichotomy.[98] According to this doctrine, the storyline of an underdog presented with a sudden challenge who, through twists and turns, eventually transforms into a hero against all the odds, as depicted in many motion pictures such as *Rocky* and *The Lord of the Rings*, is not protected under US copyright law. Copyright protects the artistic works as such; the idea is not protected, but the expression of the idea is.[99]

The idea-expression dichotomy is further extended by two related copyright doctrines: the doctrine of merger and the doctrine of *scènes à faire*.[100] When an author's expression of an idea is closely integrated with the idea embodied in the work, it might not be possible to distinguish between the two.[101] On the other hand, the number of ways to express an idea can also be very limited.[102] In both situations, the idea and how it is expressed can be considered to have merged and thus to have

[91] *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.,* 111 S.Ct. 1282 (1991), p. 1294.

[92] *Ibid.*, p. 1296.

[93] Works of authorship at 17 USC Sec. 102(a) include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

[94] McJohn (2019), pp. 33–34.

[95] 17 USC Sec.102(a). In the 1980 amendment to the Copyright Act, copyright protection was extended to computer programs.

[96] *Ibid.,* Sec. 101.

[97] Bouchoux (2012), p. 194.

[98] *Ibid.*, p. 199.

[99] Adelman et al. (2015), p. 49.

[100] Bouchoux (2012), p. 86; Samuelson (2016), p. 417.

[101] Samuelson (2016), p. 417.

[102] *Ibid.*, p. 467.

become indivisible, hence the principle of the "doctrine of merger".[103] When an expression has become standard and is therefore commonly found in works of that genre, it falls under the *scènes à faire* doctrine and is ineligible for copyright protection.[104]

Reproduction, distribution, preparation of derivative works, public performance and public displays are recognized under US copyright law as exclusive rights.[105] The exclusive right to prepare derivative works precludes others from using a copyrighted work or portions of it to create new works. An example of infringement of this exclusive right would be using copyrighted characters such as *Mickey Mouse* to produce a sequel.[106] The exclusive right of public performance applies to literary, musical, dramatic, and choreographic works, motion pictures and other audiovisual works.[107] The exclusive right of public display is applicable to paintings, sculptures and similar works.[108] Software programs as well as literary works also enjoy the pertinent exclusive rights.[109]

The guiding purpose of US copyright law is to foster the creation and dissemination of literary and artistic works in order to allow the public to access knowledge.[110] Balancing the primary and secondary aims of US copyright law requires striking a balance between the author's exclusive rights and the public's rights and privileges. The most central doctrine in connection with public engagement is the fair-use doctrine, formally codified with the passage of the 1976 Act. For activities such as news reporting, teaching, scholarship, or research, the use of copyrighted material can be allowed under the fair-use doctrine without the copyright holder's consent.[111] To determine whether a given activity qualifies as fair use, the statute includes a non-exclusive four-factor test.[112]

Since the 1980s, US courts have allowed the unauthorized digital use of copyrighted material under the fair-use doctrine.[113] Fair use has been interpreted by US courts to cover such wide uses as unauthorized copying of a software program

[103] Samuelson (2007), p. 1934.

[104] *See Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir.1930), where the leading test for comparing works with common ideas, themes, and settings was put forth.

[105] 17 USC Secs. 106, 113–115, 120.

[106] *See* Section 101 of the Copyright Act for a definition of derivative work.

[107] 17 USC Sec. 106.

[108] *Ibid.,* Secs. 113, 120.

[109] *See Meridian Project Systems, Inc v. Hardin Construction Company LLC*, 426 F. Supp. 2d 1101 (E.D. Cal 2006).

[110] *See Twentieth Century Music Corp. v. Aiken*, 422 S.Ct. 151, 156 (1975), where the court proclaimed that the "ultimate aim" of the US copyright law is to enable artistic creativity for the general public good.

[111] 17 USC Sec. 107.

[112] *Ibid.,* Sec. 107. The factors are: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work". For a recent case involving fair use in which the court applied the four-factor test, *see Andy Warhol Foundation for Visual Arts v. Goldsmith*, 11 F. 4th 26 (2d Cir. 2021).

[113] Samuelson (1993), p. 52.

for studying its structure and designing new programs,[114] unauthorized copying for extracting unprotected material,[115] and replicating copyrighted images online as "thumbnails" for search engine indexing.[116] Digitally scanning books in a host of university libraries in order to improve public access to scholarly research and archival preservation of books – as was done in the Google Books Project – has also been labeled as fair use.[117] The variety of permitted uses of copyright-protected works exemplifies the flexibility of the fair-use doctrine, which US courts have made full use of.[118]

In addition to the fair-use doctrine, another doctrine limiting the author's exclusive rights is the first-sale doctrine.[119] Under this doctrine, after a "first sale" by the author, the first copy of the copyrighted work sold may be re-distributed without the consent of the copyright holder.[120] Thus, when the copyright owner of a work, let's say the publishing company, sells a copy of the book to a bookstore, the publishing company loses the power to control how that particular book is further distributed by the bookstore. In addition to the fair-use and first-sale doctrine briefly described here, a host of compulsory licenses also limit the author's exclusive rights.[121]

Copyright protection in the United States lasts as a general rule 70 years after the death of the author.[122] In cases of work for hire, copyright duration is 95 years from the date of publication or 120 years from the date of creation, depending on which expires first.[123] After the copyright expires, the copyrighted work enters the public domain.[124]

[114] *See Sega Enterprises Ltd. v. Accolade, Inc*., 977 F.2d 1510 (9th Circ. 1992).

[115] *See Evolution, Inc. v. Suntrust Bank*, 342 F. Supp 2d 943, 956 (D. Kan 2004).

[116] *See Kelly v. Arriba Soft Corp*., 336 F. 3d 811 (9th Cir. 2003).

[117] *The Authors Guild, Inc. v. Google*, *Inc*. 954 F. Supp 2d 282 (S.D.N.Y. 2013). *See also* Samuelson (2009), p. 1374 for concerns over Google's *de facto* monopoly of vast amounts of digital books and why public access to these books should not be left to one single company, Google. Samuelson (2009), p. 1311 argues that major research libraries should collaboratively create a digital library of books from their own collections, a public digital corpus, which would serve as a realistic alternative to the Google Books project. Although Samuelson has a point in asserting that the Google Books project should not be the only option for public access for digitalized books, from the public's perspective the latter is still preferable to no access at all. I have often been able to determine whether given material is relevant from a glimpse of the content in Google Books; this often eliminates the need to obtain a physical copy of the work.

[118] Samuelson (1993), p. 51.

[119] 17 USC Sec. 109(a).

[120] *See Kirtsaeng v. John Wiley & Sons, Inc*., 133 S.Ct. 1351 (2013), where the US Supreme Court held that the first-sale doctrine applied to copies of a copyrighted work made, purchased abroad and resold in the US, thus opening the door for the applicability of the US first-sale doctrine in an international context. For a through comparative analysis of the first-sale doctrine in US copyright law and the exhaustion principle in EU copyright law, *see* Mezei (2022).

[121] 17 USC Secs. 108, 110–116, 119.

[122] *Ibid.,* Sec. 302.

[123] *Ibid.*

[124] *See* Goldstein (2005), who argues that US copyright law has contributed to the enrichment of the public domain more than critics recognize.

Although registration is not a requirement for obtaining copyright, registration with the Copyright Office to document copyright is a prerequisite for certain remedies for copyright infringement.[125] More specifically, copyright registration both entitles the author to a legal presumption that the author's work contains protectable copyright subject matter and acts as a prerequisite to obtaining statutory damages and attorney's fees.[126] Proper notice appearing on published copies ensures that, in litigation, the defendant cannot assert a defense of innocent infringement, namely that the infringer could not have realized that they were infringing a copyright-protected work.[127]

2.3 Copyright Law in China

In China, copyright protection has received less attention than the protection of patents and trademarks, perhaps because artistic property has been deemed to contribute more than industrial property to short-term economic development.[128] Another key reason why developments in copyright in China have lagged behind those in trademarks and patents is politics. For this, it is necessary to understand the discrepancy between the official commitments made by Beijing and the complex network of local bureaucracies that are *de facto* in charge of copyright policy and enforcement in China.[129] As one consequence of this, China's copyright regime has been strongly associated with piracy, i.e. unauthorized copying of another's protected work. Indeed, piracy has been widespread in the country from as early as the 1980s until the present day, although the improved enforcement of laws has reduced piracy rates.[130]

[125] McJohn (2019), p. 154.

[126] *Ibid.*

[127] *See* 17 USC Sec. 401, which lists three mandatory elements for notices: (1) the symbol ©, the word "copyright" or the abbreviation "Copr."; (2) the year of first publication of the work; and (3) the name of the owner of the copyright in the work. To illustrate, copyright notice for a selfie taken by the author could be as follows: © 2023 Author's First Name Last Name (after blind peer review this example will be modified to include the author's actual name and this comment will be deleted).

[128] Thomas (2017), p. 16. *See also* Yu (2013), pp. 107–113, who explains the gap between the impressive developments in China's patent and trademark system, and its weaker copyright system; the major impediment is the government's tight cultural and media control both online and offline.

[129] For more on the role of politics in hindering the development and enforcement of copyright protection in China, *see* Mertha (2005), pp. 15, 133–134.

[130] Chow (2015), pp. 451–453. *See also* Mertha (2005), p. 199, who argues that, for a long time, copyright management and enforcement in China has suffered from insufficient personnel and budgetary resources as well as from contradictory incentives, resulting in poor management and enforcement of copyright in China. Mertha (2005) argues that, to combat these problems, China's copyright bureaucracy has employed several strategies, including Maoist-style campaigns and alliances with certain segments of Chinese society, with a view to reducing enforcement costs.

It has been suggested that the history of China's copyright law is one of legal transplants.[131] The first copyright law in the People's Republic of China (PRC) was enacted as recently as 1990 although copyright had been specifically mentioned in the 1985 General Principles of the Civil Law of the PRC, which laid down that natural and legal persons were entitled to own copyright.[132] China's basic copyright legislation consists of, first, the Copyright Law (1990, revised 2001, 2010, 2020); second, the Copyright Law Implementing Regulations (1991, revised 2002, 2011, 2013); and finally, the Provisions on Implementing International Copyright Treaties (1992). As with the waves of amendments to China's Patent and Trademark Law in the early 1990s and 2000s, revisions to China's copyright regime have been motivated by the need to bring China's copyright legislation into line with foreign demands and international treaties.[133] The last major amendment in 2020, taking effect in 2021, completely revamped China's copyright system.[134]

China's copyright law has been lamented as difficult for Westerners to understand due to the absence of records of the conferences that adopted and revised China's Copyright Law; it is also considered to be complex and, at times, contradictory.[135] To illustrate this, I will present the aim of copyright protection in China in light of the most recent amendment of China's Copyright Law. The purpose of the latter is stipulated in its first Article, which states that it "is enacted […] for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and the rights and interests related to copyright, of encouraging the creation and dissemination of works that would contribute to the construction of a socialist society that is spiritually and materially advanced, and of promoting the development and flourishing of socialist culture and sciences".[136] This Article gives the impression that China has adopted a utilitarian justification for copyright protection although such a justification is typically more prevalent in common-law countries such as the US.[137] The very first Article of China's Copyright Law

[131] He (2020), p. 359. For an overview of the historical milestones leading to China's contemporary copyright regime, *see* Yu (2022a), pp. 685–697. *See also* Lee and Li (2023), who postulate that, although foreign pressure shaped the first comprehensive copyright statute in China, the Qing Copyright Code, that Code not only protected the economic interests of foreigners in China but, surprisingly, also aimed at advancing China's national interests in accessing Western knowledge and incentivizing the production and dissemination of knowledge in the country.

[132] *See* General Principles of the Civil Law of the PRC, Arts. 94–96 (1985), Zhonghua Renmin Gongheguo Falu Huibian (hereinafter "GPCL"). Additionally, the 1982 Constitution laid the basis for a legal regime for protecting intellectual property with provision for recognizing the centrality of the pursuit of artistic, cultural, literary, and scientific endeavors, *see* Xianfa, Arts. 20, 47 (1982). For an insight into the reasons underlying the delay in the development of China's copyright statute, *see*, for example, Han (2014).

[133] Chow (2015), p. 446; Ganea and Friedmann (2021).

[134] For critical appraisals of China's latest copyright law reform, *see* Ganea (2021), § 4.III. 3., Yu (2022a, b).

[135] Wan (2011), p. 455.

[136] Copyright Law of the People's Republic of China (as amended up to the Decision of 11 November 2020, of the Standing Committee of the National People's Congress on amending the Copyright Law of the People's Republic of China (hereinafter "Copyright Law of the PRC (2020)"). Art. 1 (2020).

[137] Wan (2011), p. 456.

stipulates that "[t]his law is enacted in accordance with the Constitution".[138] Wan has interpreted this to mean that China rejects the natural-law perspective and adopts a positive-law approach, whereby moral and economic rights are granted solely as a matter of statute.[139] China's copyright law has thus mixed multiple perspectives: it has rejected the natural-law perspective but adopted a utilitarian justification for copyright protection even though it is widely recognized that China belongs to the civil-law system, which normally follows the *droit d'auteur* tradition.[140] To add to the confusion of making sense of the underlying justification of China's copyright regime, China has struggled to decide whether to follow the Anglo-American copyright model or the European *droit d'auteur* model.[141]

To qualify for copyright protection under China's Copyright Law, a work has to satisfy three conditions. First, it needs to be deemed a work of authorship.[142] Second, the Copyright Law stipulates that copyright is inherent in certain "original" works even if these works are unpublished.[143] Originality can be further divided into "independent creation" and "creativity".[144] Independent creation here refers to the work being conceived independently, whereas creativity entails that the work demonstrates spiritual labor and mental judgment on the part of the author(s).[145] Originality then, for the purposes of copyright protection, means that the work is selected, arranged, conceived and created by the author (including one or more cooperative authors) and is not reproduced, imitated or plagiarized.[146] The author(s) need to have created the work independently without copying it from another work.[147]

Third, the work must be in a tangible medium of expression.[148] This "fixed nature" criterion entails that a work should be fixed in a certain substantive form.[149] From this fixed nature, it follows that the work can be utilized by other people, although this requirement should not be taken too strictly; some products delivered orally, such as speeches or lectures, can also be deemed to qualify for copyright protection and thus form exceptions to the basic requirement of a fixed nature.[150]

[138] Copyright Law of the PRC, Art. 1 (2020).

[139] Wan (2011), p. 456.

[140] *Ibid.*, p. 457.

[141] This ambiguity is reflected in Art. 62 of the Copyright Law of the PRC (2020), which provides that "copyright" under the law has the same meaning as "author's right", implying that these two terms can be used interchangeably.

[142] Copyright Law of the PRC, Art. 3 (2020).

[143] *Ibid.*

[144] Sanqiang (2012), p. 92.

[145] *Ibid.*

[146] Guo (2017), p. 2.

[147] Sanqiang (2012), p. 92.

[148] Implementing Regulation of the Copyright Law of the PRC, Art. 2 (2013). The requirement of works to be original and in a fixed form are similar but not identical to the originality and fixation requirements in US copyright law found in 17 USC § 102(a) (2018), *see* Yu (2022a), p. 699.

[149] Sanqiang (2012), p. 94.

[150] Guo (2017), p. 7.

However, even speeches and lectures can be publicized and spread, in other words copied, although the method of copying, being by recording or oral communication, differs from more typical forms of copying such as printing.[151]

Determining the boundary conditions of the concept of "work" as well as "originality" were at the center of the case *Zhao Jikang v. Qujing Cigarette Plant,* where the court had to decide whether the title of a literary work, namely the name of the movie *Five Golden Flowers*, was eligible for copyright protection under the Copyright Law and whether the use by another of that title as a trademark for cigarettes constituted copyright infringement.[152] The court held that, since the Copyright Law protected "works" that independently conveyed views, information, ideas and feelings, the few words of the title in isolation did not constitute an independent, original work and the title was not eligible for copyright protection.[153] However, no absolute rule exists that titles never qualify for copyright protection: only seven years after this case, another Chinese court found that work titles could receive copyright protection as long as the title was original.[154]

China's Copyright Law lists types of works to be protected, which include, *inter alia*, written works, dictated works, musical works, photographic works, computer programs, derivative works, and other works.[155] The latest amendment expanded copyrightable subject matter by amending the open-ended category from "other works as provided for in laws and administrative regulations" to the broader "other intellectual achievements that meet the characteristics of a work".[156] The revised Copyright Law now caters more appropriately for technological changes and new modes of communication.[157] As has become evident when reviewing copyright law in the EU and the US, no registration is necessary under the Berne Convention for an author to receive copyright protection for their work.[158] Thus, authors enjoy automatic copyright protection for their work in China, although voluntary registration is also possible.[159]

[151] Sanqiang (2012), p. 94.

[152] The Yunnan Province Higher Peoples' Court Civil Judgment No. Yungaominsanzhongzi 16/2003, The Publication of China Agent (HK) Ltd, pp. 325–327.

[153] *Ibid*., p. 327

[154] *China Nation Commercial Info. Ctr. v. Shilian Int'l Commercial Network Ctr. Co., Ltd*., No. 172 Jingyizhongzhichuzi (2000). Clearly, the point of departure is still that titles do not receive copyright protection, *see* Wan (2011), p. 460.

[155] Copyright Law of the PRC, Art. 3 (2020).

[156] Compare Copyright Law of the People's Republic of China (as amended up to the Decision of 26 February 2010 of the Standing Committee of the National People's Congress on amending the Copyright Law of the People's Republic of China) (hereinafter "Copyright Law of the PRC (2010)"), Art. 3 with Copyright Law of the PRC, Art. 3 (2020). The amendment codifies the practice of Chinese courts to extend copyright protection to works not specifically listed in the Copyright Law, *see e.g. Beijing Zhongke Hengye Zhongzi Technology Co., Ltd. v. Beijing Water Design Technology Co., Ltd.* (2018), where the court extended copyright protection for a musical fountain show.

[157] Yu (2022a), p. 699. For a more in-depth analysis of the changes to copyrightable subject matter brought by the latest amendment, *see* Feng and Cong (2022).

[158] Berne Convention, Art. 5, para. (2).

[159] Copyright Law of the PRC, Art. 12 (2020). *See also* Guo (2017), p. v.

In keeping with the basic premise that ideas per se are not protected by intellectual property law, ideas also fall outside the scope of copyright protection under China's copyright regime.[160] The Guangdong Higher Peoples' Court expressed this clearly in *Zhang Qingwei v. Shenjun Subway Ltd.,* which involved whether an election slogan qualified for copyright.[161] The court stated in their judgment that although creative expression was protected under China's Copyright Law, slogans fell under the category of creativity and were thus not protected by copyright.[162]

Copyright protection is explicitly denied for laws as well as for judicial and governmental decisions.[163] Mere factual news, calendars, numerical tables, formulas and forms of general use also fall outside its scope.[164]

China's current Copyright Law grants authors both exclusive property (economic) rights and personal (moral) rights. China recognizes four moral rights, namely the right of first publication, the right of authorship, the right to revise one's own work and the right to preserve the integrity of the work. The term of protection for the last three of these is unlimited.[165] Owing to its commercial nature, the first moral right, the right of publication (also known as the right of disclosure), has, by contrast, a term of protection of the same duration as economic rights: the life of the author plus 50 years after their death, *post mortem*.[166] Although the latest amendment of China's Copyright Law did not introduce artists' resale rights (*droit de suite*) in the end, the discussion of reform relating to *droit de suite* in the run-up to the new copyright statute is significant. It indicates that China might be moving away from its earlier hybrid approach to moral rights, combining French and common-law principles and balancing the differing interests of authors and stakeholders of creative works, towards that of other civil-law systems with author rights at the center.[167]

China's Copyright Law stipulates 12 types of specific restriction on the exclusive rights of copyright by allowing unauthorized use of copyrighted works in certain cases, such as for the purposes of research, education and the media, as stipulated in

[160] Ganea (2021), § 4.IV. 1.

[161] *Zhang Qingwei v. Shenjun Subway Ltd.*, Civil Judgment of Guangdong Province Higher Peoples' Court (2006) Yue Gao Fa Min San Zhong Zi No 44.

[162] *Ibid.*

[163] Copyright Law of the PRC, Art. 5(1) (2020).

[164] *Ibid*., Art. 5 (2) and (3). The latest amendment changed the wording from "news on current events" to "mere factual news" or "purely factual information" (depending on the translation), which can be seen to signal stronger protection for news reporting, which often displays originality and creative content in need of copyright protection, *see* Ganea (2021), § 4.IV 2. (g) and Yu (2022a), p. 701.

[165] Copyright Law of the PRC, Art. 22 (2020). For a detailed analysis of moral rights in China's Copyright Law, *see* Wan (2011).

[166] *Ibid.*, Art. 10(1) and Art. 21.

[167] Liang (2009), p. 108. For a comparative analysis of impediments to introducing *droit de suite* in China and the US, *see* Suchen (2021). On *droit de suite* in international harmonization, *see* Berne Convention Art. 14ter.

Art. 24 of the Copyright Law, as well as by containing an open-ended provision that includes "other works as provided for in laws and administrative regulations".[168] Additionally, Art. 26 provides for compulsory licensing. Chinese legislators had opted for a closed-list copyright exception model for several reasons, many of the underlying factors being the same reasons why other civil-law countries adhering to the *droit d'auteur* system have been more inclined to adopt a closed list of exceptions as opposed to an open-ended model.[169] In addition to historical reasons, China has also been hesitant to directly transplant a US-style fair-use model since such an approach to fair use would facilitate more flexibility and freedom of speech, whereas the Chinese government favors content control.[170] Moreover, since China lacks any historical connection with the British fair-dealing paradigm, it has been able to build a fairly unconstrained form of fair use of copyright to fit the Chinese context, reflecting the more general and recent trend of China evolving from norm taker to norm maker with regard to its IP legislation.[171] Whether China could and should adopt a more flexible approach to copyright exceptions continues to be debated.[172]

3 Explaining Differences and Similarities

Determining the focus of comparative law has sparked differences among comparatists: some have viewed similarities in legal cultures as the point of departure, whereas others have presumed differences.[173] These opposing views have

[168] Before the amendment of 2020, China's Copyright Law only provided for a closed list of 12 specific types of limitations, *see* Copyright Law of the PRC, Art. 22 (2010).

[169] Kalscheur (2012), p. 525.

[170] He (2020), p. 20.

[171] Zhang (2017), p. 74. *See also* Yu (2019), pp. 424–429, who points out that, although China has been widely considered a norm breaker (due to massive piracy and counterfeiting activities) and a norm taker (having largely transplanted intellectual property legislation) in the intellectual property arena, the country is gradually assuming more assertive roles as a norm maker and "a norm shaker", one that undermines, challenges or even disrupts established international norms.

[172] Advocating for the adoption of a US-style fair-use model, although with certain caveats, *see* Zhang (2017), p. 74. In contrast, He (2020) has proposed that a US-style fair-use model would be incompatible with the Chinese context. *See also* He (2022), pp. 120–121, who advocates either adopting a closed list of exceptions to moral rights or following the Australian open-ended model to clarify prudently selected exceptions to moral rights under China's copyright law.

[173] Most notably, Zweigert and Kötz (1998) have, in their seminal book *An Introduction to Comparative Law*, focused on the similarities across legal cultures, adopting a *praesumptio similitudinis*. On the other hand, Legrand has been a vocal advocate of legal diversity, for whom comparison is first and foremost about seeking differences, *see* Legrand and Syssau (1999), pp. 102–103. According to Legrand, there are major differences in ways of thinking about law, what he has coined legal mentality, *mentalité*, across legal cultures, *see* Legrand (1996), p. 60. Legrand's notion of legal mentality bears some resemblance to the concept of mental programming developed by prominent social psychologist Hofstede, who conceptualized national cultures as the programming of the mind in such a way as to distinguish the members of one group from another, *see* Hofstede et al. (2010), p. 4. Both Legrand's and Hofstede's views are loosely rooted in a similar underlying assumption: that individuals are socialized into a given culture, be it legal or national, which then becomes the mind's operating system and underlies the thoughts and actions of individuals in that culture.

been interpreted to reflect a deeper paradigmatic dichotomy of nature versus cultural divide.[174] Although both views have their merits, in this study I have not adhered in a purist manner to either of these approaches. Instead, I have aimed at paying at least fairly equal attention to differences as well as similarities between the fields of law analyzed. In other words, I have, like many other comparatists, favored the middle-ground approach.[175] However, I have chosen first to focus on differences and then to analyze similarities. Apart from practical reasons (either one or the other has to be analyzed first unless an approach integrating both similarities and differences is chosen), this choice is motivated by the notion that when we encounter "the other", we have a natural inclination to notice differences first. It is the differences that first catch our attention, intrigue us, amuse us and even annoy us. It is to these intriguing differences that I will turn next.

3.1 How Does Copyright Law Differ – and Why?

Copyright faces the dual challenge of having to achieve a balance between providing sufficient protection to authors and right holders, and accommodating the needs of the information society and the public concerned with access to content.[176] One of the main distinctive features of the concept of copyright in the EU, the US and China is how the concept of moral rights is viewed differently in each jurisdiction. Whereas common-law countries exclude natural rights from copyright protection, civil-law countries, to which most EU Member States belong, recognize artists' moral rights to their work as an inherent part of copyright protection.[177] This differing outlook can be explained by noting that the main rationale underlying copyright protection in the United States is utilitarian. On the other hand, to promote progress in the creative and expressive arts in order to advance societal culture, the primary social utility objective underlying copyright regimes in many EU countries is based on the recognition of natural rights, *droit d'auteur*, according to which the authors have a personal connection with and responsibility for the works they create in such a way that the works can be viewed as extensions of themselves.[178] Interestingly, China's copyright law has mixed elements of both perspectives: it has adopted a utilitarian justification for copyright protection, even though it is widely recognized that China belongs to the civil-law system, which generally follows the *droit d'auteur* tradition.[179] Additionally, a recent experimental study suggests that Chinese judges take precedent into account. However, they conceal this in their written reasons, where they refer mainly to statutes.[180] Although the findings are

[174] Samuel (2007), p. 230.

[175] *See* Dannemann (2019), p. 421 for an insight into the ongoing debate between supporters of presumed similarity, advocates of differences as a priority, and those choosing an in-between position.

[176] Stamatoudi and Torremans (2021), p. 1.

[177] Hansmann and Santilli (1997), p. 96.

[178] Kelli et al. (2014), p. 109. *See also* Hansmann and Santilli (1997), pp. 109–110; Pila and Torremans (2019), p. 14.

[179] Wan (2011), p. 457.

[180] Liu et al. (2021).

preliminary and run counter to previous scholarship based on survey data, the results suggest that categorizing Chinese judicial reasoning into a neat box of civil law might be misleading.[181] Similarly, Jia argues that the issuing of guiding cases by China's highest court, the Supreme People's Court, which are *de facto* binding on lower courts as part of China's judicial reform since 2010, has arguably moved China into closer alignment with the common-law tradition.[182] However, he also notes that the civil-law tradition is familiar with the use of case law in order to promote uniformity and predictability, even if judicial decisions do not have the authority of *stare decisis* seen in common-law precedents.[183]

The difference in copyright doctrine with regard to moral rights in the EU and China compared with the US can thus only be partly attributed to a divide between the legal cultures of common law and civil law. To make further sense of the different outlook between the US, the EU and China, we could turn to national culture as one viable explanation. American legal scholar Holst has explained US reluctance to incorporate moral rights into its legal framework of IP protection on cultural grounds: "Art and literary works were a fundamental part of European culture, while United States culture developed around industry and economy".[184] A related explanation drawing on economic analysis explains US reluctance to adopt the Berne Convention: since the US remained mainly an importer of intellectual property for longer than many other developed nations, its economic interests were not served by protecting the rights of producers.[185] Conversely, as the importance of US exports covered by conventional copyright increased, signing the Berne Convention made sense in order to ensure the enforcement of US artists' rights in foreign nations.[186] It is worth noting that the differing approaches to moral rights are enabled by the Berne Convention, which, while requiring recognition of the moral rights of attribution and integrity, does not contain any explicit requirement for its signatory countries to include statutory moral rights.[187]

Other notable differences are found in the underlying copyright doctrine. For instance, the merger doctrine is not explicitly recognized in copyright internationally outside the US, as it has emerged as a common-law concept in US case law.[188] Moreover, the fair-use doctrine, which limits the rights of copyright holders, is more broadly defined in the US than in the EU.[189] By contrast, China's copyright law makes no explicit reference to the first-sale doctrine per se but, in the latest revision

[181] *Ibid.*

[182] Jia (2016), pp. 2213–2214.

[183] Jia (2016), pp. 2231–2233. *See also* Zhang (2012), pp. 8, 43.

[184] *Ibid.*, p. 134. For more recent but equally critical work on moral rights in the US, *see* Adler (2009) and Rigamonti (2006).

[185] Hansmann and Santilli (1997), p. 142.

[186] *Ibid.*

[187] See Berne Convention Art. 6^{bis}. *See also* Hughes (2007), who questions the overly dichotomous juxtaposition of moral rights as stemming from protection of culture and the arts in Europe, and, on the other hand, as being driven by purely economic incentives in the US.

[188] Samuelson (2016), p. 417.

[189] McJohn (2019), p. 33.

to China's Copyright Law, the earlier closed list of copyright exceptions was extended by an open-ended provision.[190] What explains this difference? One obvious explanation can be found in the TRIPS Agreement: "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights".[191] Because TRIPS is silent on the issue of copyright (and, for that matter, any other IPR) exhaustion, the Agreement provides for national discretion for signatories to decide on their own rules regarding exhaustion of copyright.[192]

3.2 How is Copyright Law Similar – and Why?

From differences, I will now turn to identifying commonalities in copyright law among the EU, the US and China, in order to give meaning to comparative convergence. This endeavor is inspired by Lundmark's exhortation: "it is hoped that future scholars will take a more nuanced view of […] the supposed divide between the common law and civil law worlds without forgetting that all legal systems in both of these traditions have far more in common with each other than not".[193] Not all, but a majority, of EU Member States belong to the Romano-Germanic or civil-law legal tradition, whereas the US is, with some notable exceptions (such as the state of Louisiana, which has a mixed legal system), a common-law country. On the dichotomic continuum of civil law to common law, China falls into the civil-law tradition. However, as noted at the outset of this study, while this characterizes many of the main features of the Chinese legal system, the latter has features also of socialist, Confucian and East Asian law.

In comparative literature, congruence has often been taken to be an explanatory factor for variation between the jurisdictions compared.[194] Furthermore, harmonization and convergence have been treated separately, with harmonization viewed as a deliberate process, and convergence as evolving without planning.[195] Siems has further distinguished convergence through congruence, and congruence through pressure.[196] Convergence through congruence has taken place due to similar social, political and economic circumstances at an international level and is manifested by growing interdependency between societies, cultures and economies.[197] One can credibly postulate that the US and the EU, as representatives of Western capitalist and democratic thought with highly interdependent economies, have been faced with similar challenges socially, politically and economically, thus explaining some of the similarities found in their respective copyright laws. Although China's path socially, politically and economically differs significantly from its Western

[190] *See* Copyright Law of the PRC, Art. 22 (2010). *Cf.* Copyright Law of the PRC, Art. 24 (2020).

[191] TRIPS Agreement, Art. 6.

[192] This freedom provided by the TRIPS Agreement extends to rules regarding the exhaustion of other IPRs as well. On the exhaustion of copyright in China, *see*, for example, Chow (2011).

[193] Lundmark (2012), p. 436.

[194] *See*, for example, Merryman (1999), pp. 26–32 and de Cruz (2007), p. 510.

[195] Antokolskaia (2006), pp. 21, 23.

[196] Siems (2022), p. 307.

[197] *Ibid.*, p. 266.

counterparts, China's catch-up in the last decades in reforming its copyright law has meant that the latter is in compliance with international legal standards, although inadequate enforcement, as well as copyright infringement and counterfeiting continue to undermine the credibility of China's copyright regime by Western standards.[198]

On the other hand, convergence through pressure refers to the influence of international and regional organizations and lobbying efforts.[199] Similarities between the EU, the US and China in copyright law can be at least partly explained by the international harmonization of IP law through the formation of various organizations and agreements governing intellectual property commodities. Consequently, convergence of copyright laws is not only an expectation but an outright obligation since the EU, the US and China are all members of the WTO and WIPO, as well as parties to a host of international IP agreements such as the Berne Convention and the TRIPS Agreement. Especially in the case of China, convergence through pressure from its trading partners, most notably the US, has played a major role in why China's copyright law has, in a relatively short period of time, been transformed to resemble copyright law in the US and Europe.[200]

Although intellectual property rights are usually territorial in their effects, the basic elements of copyright protection, as a means of enforcing copyright against infringement and allowing the public to engage with the copyright owner's exclusive rights for various reasons are similar in the EU, the US and China.[201] Restrictions on copyright similar to those in the US, such as the fair-use and the first-sale doctrine, are also found in the copyright regimes of the EU and China, although under different names and with slight variations.[202] One explanation for the similarity found is that all the copyright regimes aim to strike a balance between an inherent conflict of interests: the legal rights of copyright holders and the fair-use rights of the general public.[203] Which goal weighs more may vary depending on the circumstances, but at least the pendulum swings between these conflicting interests in all jurisdictions.[204]

[198] Chow (2015), pp. 451–453.

[199] Siems (2022), pp. 313–314.

[200] Numerous scholars have identified pressure from abroad, especially from the US, as the main impetus for China having adopted a Western-style IP regime in a matter of a few decades. For summarized analyses, *see*, for example, Bruun and Zhang (2016), p. 45, Chow (2015), pp. 429–432 and, more extensively, Mertha (2005), pp. 1–34. More generally on the complexities of the bilateral US–China relationship, *see* Foot and Walter (2011).

[201] McJohn (2019), p. 33.

[202] According to McJohn (2019), p. 33, the US fair-use doctrine is more broadly defined than in other countries.

[203] *See* Blythe (2006), p. 128. Mezei (2022), pp. 19–20 has argued that the exhaustion principle in the EU means a user right balancing copyright holders' rights whereas in the US the first-sale principle is an affirmative defense to copyright infringement.

[204] Blythe (2006), p. 111.

More specifically, on the similarities of copyright in the EU, the US and China, works must possess some degree of originality in order to attract copyright protection.[205] The Berne Convention contains no definition of originality but instead leaves the question of originality for national courts to decide.[206] How originality has been interpreted by courts in the EU and the US is similar, as two distinct requirements for originality have been employed in both jurisdictions. The originality requirement was harmonized in the EU by the CJEU in a series of cases to mean the "author's own intellectual creation".[207] To identify an authorial work, the CJEU relies on a two-stage test: first, the court evaluates whether the subject matter is of protectable in a way that leaves scope for the exercise of free and creative choices in its creation.[208] Second, the CJEU looks at whether the subject matter is protected, which involves considering whether the creation involves the exercise of free and creative choices and bears the personal mark of its creator.[209] In the US, the Supreme Court has required originality to be both "independently created by the author" and "with minimal degree of creativity".[210] In China, the Copyright Law stipulates that copyright is inherent in certain "original" works.[211] Originality, then, in the sense of copyright protection, means that the work is selected, arranged, conceived and created by the author (including one or more cooperative authors) and is not reproduced, imitated or plagiarized.[212] Requirements for originality in the EU, the US and China contain similar elements of creativity and independent work. This can be explained by the Berne Convention, to which all three are parties: even though "originality" per se is not defined in the Berne Convention, "original" under the Convention is considered to mean that the work reflects creativity and is not merely a copy.[213] Although works resulting from artistic endeavor often receive copyright protection, both in EU copyright legislation and in the US in case law, the stance has been adopted that aesthetic

[205] Kur et al. (2019), p. 3.

[206] Guide to the Berne Convention (1978), pp. 17–18.

[207] Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* [2009] ECR I-6569, ECLI:EU:C:2009:465, para. 37; Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v. Ministerstvo kultury* [2010], ECR I-13971, ECLI:EU:C:2010:816, para. 45; Joined Cases C-403/08 and C-429/08, *Football Association Premier League v. QC Leisure* and *Karen Murphy v. Media Protection Services Ltd.* [2011] ECR I-09083, ECLI:EU:C:2011:631, para. 97.

[208] Pila and Torremans (2019), p. 253.

[209] Case C-604/10 *Football Dataco and Others v. Yahoo! UK Ltd. and Others*[2012] ECLI:EU:C:2012:115, para. 38; Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening* [2009] ECR I-6569, ECLI:EU:C:2009:465, para. 45; Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v. Ministerstvo kultury* [2010], ECR I-13971, ECLI:EU:C:2010:816, para. 50; Case C-145/10 *Eva-Maria Painer v. Standard VerlagsGmbH and Others* [2011] ECLI:EU:C:2011:798, paras. 89, 92.

[210] *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.,* 111 S.Ct. 1282 (1991).

[211] Copyright Law of the PRC, Art. 3 (2020).

[212] Guo (2017), p. 2.

[213] Guide to the Berne Convention (1978), p. 17.

appeal or merit per se is not, or at least should not be, considered a necessary requirement for copyright.[214] In practice, though, in both jurisdictions, judges struggle with ignoring the aesthetic value of a work when judging its eligibility for copyright protection.[215]

Having established legal borrowing as one explanatory factor for the similarity of copyright law in the US, the EU and China, the next step is to ask what motivated the Chinese to emulate the copyright law of such developed nations as the US and the EU.[216] Some have suggested that the Chinese valued experience and, since they lacked sufficient IP law resources in their own tradition, it was convenient to turn to nations with more established IP regimes for benchmarking when drafting their own copyright law.[217] Additionally, economic considerations have been attributed a key role: China recognized that providing better legal protection for intellectual property owners was a prerequisite to accelerating its economic development by attracting foreign direct investment, particularly from the United States.[218] In contrast to these more coercive tactics, the EU has deliberately used soft tactics such as technical assistance and training to raise the level of IPR protection in China through the transfer of EU IP norms.[219]

By applying the path dependence theory to copyright law, we see that the shaping of copyright law has been influenced by evolutionary change in the past, akin to evolution in nature.[220] Another useful theoretical lens through which to explain the convergence of China's copyright law with that in the EU and the US is institutional isomorphism.[221] With its origins in sociology, institutional isomorphism is based on the premise that, to gain and maintain legitimacy, institutions come to resemble the accepted norm over time.[222] Given that institutional isomorphism can be used to explain change and conformity also in politico-legal fields, institutional isomor-

[214] For EU copyright, *see* Art. 1(3) and recital 8 of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version) [2009] OJ L 111/16, and Art. 3(1) and recital 16 of the DSM Directive. For the US, the landmark case in which the Court held that copyright protection was not predicated on the artistic merits of a work is *Bleistein v. Donaldson Lithographing Co.,* 188 S.Ct. 239 (1903), 251–252.

[215] Van Gompel and Lavik (2013), p. 10; Walker and Depoorter (2015), p. 347.

[216] For more on how legal borrowing explains the similarities of China's copyright law to those of the EU and the US, *see* Sobel (1989), p. 63. More generally on legal borrowing, *see* Husa (2018).

[217] Bruun and Zhang (2016), p. 46.

[218] Oehler (1987), pp. 452–453.

[219] Crookes (2014).

[220] Here, I am referring to the path dependence theory rather generally to indicate that "history matters". For a more nuanced discussion of the three variations of path dependence in law, *see* Hathaway (2001), pp. 601–666.

[221] Liu (2006), p. 78.

[222] DiMaggio and Powell (1983); Meyer and Rowan (1977), pp. 340–341, 358–359. Institutional isomorphism might help explain why high-end law firms, banks, and luxury hotels share similar main features regardless of their country of origin or place of operation.

phism would here suggest that China's copyright law has been molded to conform with Western-style copyright in order to be viewed as legitimate.[223] However, commonalities should not be accepted at face value, as, underneath apparent convergence, differences may still loom. Underneath the apparent convergence between East Asian and Western legal systems, major differences still persist after almost 40 years of legal change and legal transplants.[224] Critics of institutional isomorphism have pointed out that, although institutions may seem similar on the surface, the meanings of institutions reconstructed by local actors may still reflect local needs and demands.[225] So, too, there is evidence that increasingly indigenous social and political demands in China are growing in importance; thus, apart from external forces, the internal demand for rewarding inventive and creative activities has also been attributed a role in introducing Western-style IP legislation to China.[226]

4 Conclusion

In this study, I have analyzed copyright law in the EU, the US and China. I have sought to address two interrelated questions, namely, first, *to what extent the copyright regimes in the European Union, the United States and China resemble each other and to what extent they differ,* and secondly, *what possible factors explain the similarities and differences in copyright law in the European Union, the United States and China?* The differences between the respective copyright laws are explained, *inter alia*, by differences in IP doctrine. It follows that the different objectives of copyright protection as well as the divide in terms of the role of statutory law and case law between the common-law and Romano-Germanic law traditions explain some of the differences found. For instance, moral rights are an inherent part of copyright doctrine in EU Member States whose cultures place emphasis on art and literary works, whereas, in the US, the existence of moral rights has been and remains more ambiguous, with US culture placing more emphasis on industrial and economic matters. Although China's copyright law recognizes various types of moral rights, the country has adopted a utilitarian justification for copyright protection, which is a typical underlying rationale for copyright law in common-law countries.[227]

I find that, to a great extent, similarities in copyright law stem from convergence through pressure and, more specifically, international harmonization efforts, mainly

[223] For the applicability of institutional isomorphism beyond the institutional context, see Beckert (2010), pp. 152–155. Beckert (2010) points out that the processes of isomorphism leading to convergence are not universally inevitable and, under some conditions, divergence can emerge instead. Thus, China's Copyright Law was not bound to resemble Western copyright law; instead, power exerted by external actors (such as the US) and the mimicking of copyright law to address uncertainty are factors that have contributed to the path of convergence.

[224] Pistor and Wellons (1999); Liu (2006), p. 78.

[225] Liu (2006), p. 78.

[226] Bruun and Zhang (2016), p. 46.

[227] Wan (2011), p. 457.

through bringing the copyright law of the various regions into line with international copyright treaties. In the case of China in particular, convergence through pressure motivated by economic considerations has played a major role in assimilating China's copyright law to its Western counterparts. Apart from pressure, the EU has used soft tactics in an effort to exert influence over Chinese IP legislation and practices, in order to more closely align them with the European approach to copyright protection.[228] The similarity between the Western copyright laws analyzed in this study and China's copyright law are attributable to legal borrowing, where China's legislators have intentionally sought to mold China's copyright law by benchmarking it against countries with more established copyright regimes. More recently, making China's copyright law appear legitimate in international comparisons has also been driven by internal demand, as opposed to earlier efforts being mainly driven by trade pressures from China's western trade partners. Yet much work remains, as the high rates of counterfeiting and piracy indicate, if China seriously wants to gain more complete legitimacy for its copyright regime in the international arena: "to complete or at least accelerate its catch-up in IPRs".[229] Each of the three copyright regimes tries to achieve a balance, with an inherent conflict between the legal rights of creators of copyrighted works and the fair-use rights of the general public. Whereas in the US the doctrine is called fair-use doctrine and acts as a defense, the preferred term in the EU is copyright exhaustion, with emphasis on the right of the user to use the copyrighted work once it has been handed over. Requirements for copyright – work, originality, and in a fixed form – are also similar in the three jurisdictions.

In addition to contributing to veins of literature comparing IP and, in particular, copyright law, this study situates itself in comparative law. Recently, calls have been made to reassess assumptions and lines of reasoning in comparative law.[230] In a similar spirit of renewal, I propose that comparative law cannot and should not cater to all tastes à la Swedish smorgasbord by trying to be "everything to everybody".[231] Additionally, the field has an abundance of theorizing about comparative law and legal families and traditions but less hands-on guidance on how to compare specific areas of law.[232] Surely, developing the theory of

[228] For an example of technical assistance programs as a form of soft tactic in bilateral EU-China relations, *see* Crookes (2014).

[229] On the role of IP legislation in China's catch-up process, *see* Zhao (2018) and Wang (2004).

[230] Glanert et al. (2021).

[231] Similarly, the methodological freedom characteristic of comparative law should not be misinterpreted to mean that "anything goes" as Husa (2023), p. 1; Husa (2006), p. 1096, has repeatedly warned against over the years.

[232] Van Gestel et al. (2012) have noted that there is insufficient advice available in handbooks on comparative law on even such basic premises of research as how to formulate research questions while avoiding ethnocentricity, and how to select the legal systems for comparison. For an informative overview of the orientation of general comparative law books, *see* Siems (2022), p. 6.

comparative law is, and should be, a key priority in a field that essentially lacks its own substantive law.[233] Yet, as the majority of comparatists are mostly engaged in armchair theorizing about comparative law and not concerned with actually conducting comparative analyses, this imbalance can lead to a deficiency in high-level studies carrying out actual comparisons.[234] This study, while only a drop in the vast ocean of comparative scholarship, has aimed to carry out a comparison that benefits both the academic field as well as practitioners by conducting what I refer to as an "apples to apples" comparison – one that allows the reader to trace how particular features of copyright have been approached in the different jurisdictions while not neglecting to offer feasible explanations for the differences and similarities found.

Comparative law as a research field has always tried to fulfill the double mandate of practical relevance and academic sophistication.[235] As discussed earlier in the course of this study, the copyright regimes of the US, the EU and China are also constantly struggling to find a balance between two main competing aims – public interest and private gain – and with this, these regimes can be likened to the ancient Roman god Janus with his two faces. As with the double, "two-faced", mandate of comparative law and copyright regimes, this study, too, has aimed to achieve multiple objectives while catering to multiple audiences, a balancing act not easily achieved.[236]

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[233] Instead of lamenting "the indiscipline of comparison", Edmond asserts that we should embrace it: "We as comparatists have much to gain by turning our apparent lack of discipline from a weakness into a strength, and even more by unleashing the power of comparison to generate new ways of imagining the world", *see* Edmond (2016), p. 657.

[234] Husa has stated in a similar vein that, although being a comparatist is often in vogue, actually carrying out comparative legal research is less common. Although Husa directs his criticism at legal scholars in general, the problem persists: ambitious comparative studies remain scarce, *see* Husa (2023), p. 12. *Cf.* Siems (2022), p. 7, who seems to be more tolerant than Husa of this imbalance by asserting that "comparative law is what comparative lawyers do".

[235] Reimann (2012), p. 32.

[236] For more on this "balancing act of comparative law", *see* Husa (2021), p. 769.

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