

## **Research Plan TranSIP**

### **1. Name**

- Title of the project:** Legal Transplant For Innovation and Creativity: A Sino-Finnish Comparative Study On Governance of Intellectual Property Rights (TRanSIP)
- Consortium Leader:** (PI of the Consortium) Asst. Prof. Nari Lee
- Principle Investigators:** Asst. Prof Nari Lee & Prof. Niklas Bruun
- Site of the research:** Hanken School of Economics, Department of Accounting and Commercial Law & University of Helsinki, Faculty of Law. (Also in China), Chinese Academy of Social Science & Shenzhen University School of Law.

### **2. Background**

The Academy project “Legal **Trans**plant For Innovation and Creativity - A Sino-Finnish Comparative Study on Governance of **Intellectual Property Rights**” (*TranSIP*) is a comparative law research project which undertakes collaborative research in academic institutes in China and Finland. The Consortium application is submitted in response to the joint project call with CASS but each subject project collaborates with two Chinese academic institutes– Chinese Academy of Social Science (CASS) and Shenzhen University School of Law collaborating under the call “2.2.6.2. Law and humanistic and social science law research (Academy Funding.) Beyond the named partners to the projects in China, the consortium envisions extensive international collaborations in Europe (University of Oxford, Max Planck Institute for Intellectual property and Competition Law/Germany, Goethe-Universität Frankfurt/Main - Cluster of Excellence Normative Orders/Germany), in the U.S. (Drake Law School/US and Chinese Intellectual Property Resource Center at John Marshall Law School/US), as well as Nordic collaboration (Nordic Intellectual Property Research Network).

The core of the research explores the interaction of the law and the changes in the society, through regulation of economic activities as observed in the development of Chinese intellectual property laws. In particular, we explore the use of legal transplant as a method of inducing societal and behavioural changes, in particular to promote innovation and creativity in China.

Intellectual property (hereinafter IP) law aims to foster innovation and creativity in a society. However, contemporary history in the development of IP law norms in different nations is marked with the history of legal transplants. (e.g. Geller 1995, Shi 2010) Due to its strategic importance to national economies, the norms of international IP are increasingly connected to culturally and socially sensitive resources, which have long been considered to be outside the property relations, such as genetic resources, traditional medicines and knowledge. Framing the use of such locally sensitive resources in culturally disparate societies as the issues of individualist Western and European system of IP has raised controversies and

objections among the legal scholars (e.g. Teubner and Fischer-Lescano 2008). Even in less contentious subject matters of protection, the raised protection of IP rights enshrined in international treaties highlights the tension between the commercial interests of the producers (i.e. private and individual right holder) and the interests of the users and the general public..

If the law is there to recognize pre-existing normative order, the laws that are introduced to a foreign culture may only successfully be implemented as a matter of an “unusual and accidental coincidence”, (un *grand hazard*) as noted by Montesquieu. Various comparative lawyers have assessed and identified negative and positive aspects of borrowing or transplanting legal concepts and systems into a different cultural context. Some are more negative (Savigny 1986, Kahn-Freund 1974, Friedman 1977), while others seem more positive (Watson 1974) and some may question the behavioural dynamics induced by the transplanted law (Seidman and Seidman 1994). While some may question the very possibility of comparison, at least among those that accept such possibilities of comparison, the necessity to adapt or modify the transplanted systems to local conditions are highlighted. (Zweigert and Kötz, 1998).

The above debates of comparative law scholars are not tested in the development of IP law. In the area of IP law, scholars have only sporadically attempted provide an explanation for or an anecdotal consequence of legal transplant. Motivations for and the measurement of a successful legal transplant in the area of IP have not been rigorously researched. Some scholars who study the political economy of the law pointed out the development for example is a continuation of colonialist legacy or an imperialism, imposed by way of *external pressure* (e.g. Peukert 2012, Oddi 1996) while others postulated that such legal transplant is based on *deliberate local motivation* of the recipient country (e.g. Yu 2007 , Wechsler 2008).

The literature often presents the recipient nation’s successful statutory implementation of international treaty obligations such as WTO-TRIPs agreement, as evidences of legal transplant. For example, recent Chinese induction into WTO trading system, and joining of a set of international treaties as well as local policies to promote innovation and creativity seem to have lead to a series of IP law reforms in China. These laws and policies provide rich statutory and textual evidences of legal transplants and their impact need to be critically analysed from comparative law’s perspectives as to their efficacy in achieving the objectives that they are devised to achieve. The adoption of international standards has to be followed by regional transformation, implementation and enforcement. In the project we want to explore how these international standards are dealt with by local stakeholders who are acting with these standards in a context where economic, cultural and legal traditions play crucial roles.

The project aims to fill the gaps in research on legal transplants and local IP governance and enforcement by analysing recent Chinese reforms of IP law and policies, with the concept of legal transplant. In particular, the Consortium explores the external and internal triggers for legal transplant in the context of Chinese IP law and policy, highlighting European and Nordic influences. By exploring both external

and internal motivations for adopting foreign legal doctrines, concepts and even system, we aim to present a more holistic picture of how the system of IP law develops, across the national and cultural boundaries.

### 3. Objectives

Contemporary IP law is an invention and an outcome of historical evolution and deliberate interventions by political authorities in Western legal tradition. (Sherman and Bently 1999). Understood in this context, the introduction of IP law to China may provide one example of a legal transplant of a system. An intuitive observation would be that the rationales for normative conventions and concepts used in IP as a private property right may be a poor fit to hybrid economies. To an extent, this intuitive observation seems to be true. Despite the legislative efforts and enactment of the statutes in the “book,” the implementation of the law in practice and the law enforcement mechanisms seem to remain a concern. Liu, for example, paints a pessimistic picture of the legal transplant of patent system in China. (Liu 2006). The concerns seem to question of using legal transplants as a method of introducing changes in the society. At the same time, scholars (i.e. Yu 2007, Wechsler 2008) also argue deliberate and continued introduction and transplantation of obviously foreign legal concepts and doctrines, can be motivated by the local policies for innovation and creation strategy.

In sum, there seem to be two types of triggers as to why a society adopts and transplants the legal concepts, doctrines, and systems developed abroad: *the external pressures* from the international community and *internal and local strategies* to develop local innovation and creative industries. Transplanted norms, according to international relations theory would lead to further local and regional transformation which will be fed back to the process of international norm setting. In this context, local society may not only be a passive recipient of the norms but also emulators of new norms. Acharaya describes this as the two-way nexus between regional and global normative structures which can take different forms of localization or subsidiarity (in Paul ed. 2012:201)

External pressures for legal transplants are most obviously witnessed in the harmonization and convergence through international conventions in the path of international norm setting. Through international harmonization of IP laws, societies with different cultural and economic conditions have received not only the concepts and doctrines of law, but also in certain cases, an entire system of property relations. The modern IP law regime that was originated in Europe and has evolved for hundred years and the social, cultural and technological context of European nations lays the foundations of the norms of protection, use and enforcement of IP rights enshrined in international treaties (notably the Paris and Berne Conventions) Since the 19<sup>th</sup> century, we have seen prolific growth of bilateral, multilateral treaties, each converging the norms of IP such as the WTO-Trade Related Aspects of IP Rights (TRIPs) agreement. Most notably, recent Anti-Counterfeiting Trade Agreement (ACTA) which targets at enhancing plurilateral cooperation to enforce IP rights, carries the convergence one step further. While the impact of the treaty would be felt strongly in China, the fact

that China and many other countries were not invited to the negotiation highlight the troublesome nature of the process in the development of IP law.

Furthermore, the development has largely been a reaction to the technological development. The changes in information and communication technologies, and ubiquitous media such as internet has sparked national and regional government to adopt policy measures to accommodate the law in the book to the market conditions, or to initiate debates on legislative reforms. European Commission's IP policy statement highlights among others, the need to manage IP rights for distribution of creative contents, and enforcement of the rights in fragmented market. (European Commission 2011). As local IP policies and governmental strategies for innovation and creation often look into the other countries' policy examples for best practices, these policies may motivate local decision makers to introduce new regulatory concepts and doctrines based on foreign legislative examples as a means to implement their policy recommendations. In this context, local policies for innovation and creation in response to technological and market changes may be analysed as drivers for locally motivated legal transplant.

In this context, the Consortium aims to explore, and analyse recent legal reforms that affect the practices of collective management of the rights, dispute settlement as well as enforcement of IP rights in China and in Finland and Europe. An initial legal transplant of IP system and norms may be measured by the presence of *a set of local legislations* and institutions of authorities (courts, administrative agencies and other public offices), using equivalent concepts and doctrines to those of other jurisdictions. After initial introduction of transplanted systems, the recipient countries need to deal with the consequence of having such systems by way of managing claims to rights, disputes and their enforcement. In this context, the system develops through not only interpretation of the statutes by the court, but also through development of *local customs and practices* surrounding the claims to rights, disputes as well as enforcements need to follow, resulting from the introduction of the legislation. One such challenge that China as well as Europe faces, now is the question of IP governance to manage a mass of IP rights and enforcement.

The Consortium subprojects will each focus on two aspects of IP governance in China and Finland: (1) Collective rights management, with particular focus on Nordic model of extended collective licensing (ECL) and (2) enforcement of IP rights in light of national innovation strategy. *Taken together, the two research findings would present a holistic assessment on the utility of legal transplant as a method of generating social change, in the particular context of China, following the initial legal transplant of the system of IP.*

**(1) Collective Rights Management in China and Finland (Hanken)** The theoretical context of this research would be based on the theory of collectivisation in IP system (Rosen ed. 2012) Recently, a proposal has been drafted to revise Chinese copyright law to introduce Nordic style extended collective licensing (ECL) into Chinese copyright law. This is one good example of locally motivated legal transplant to induce best practices, observed abroad into China. As a mechanism to deal with the increasing transaction costs caused by the thickets of rights, scholars often considered

collectivization (Shovsbo 2012). Collective management of rights are often recommended to the problem of increased stake holders, users and claim holders, who emerge as a consequence of new system of rights. (Jiang and Gervais 2012). In particular, to manage the thickets of right holders and potential disputes by the claim holders who may not be identifiable, a mandatory licensing mechanism or extended collective licensing for a certain category of innovative and creative works are recommended as a solution. (e.g. Wang 2010) Extended collective licensing in Nordic countries which provide a mandatory licensing platform administered by the collective rights management organizations are often considered a better option to collectivise individual rights than introducing compulsory licensing system as they are provide more options for the creators and generally considered more market oriented. (e.g. Koskinen-Olsson 2010). The specific collective feature with extended collective licensing is that it gives a mandate to the right holders' organisations to act also on behalf of non-Members. This unique approach makes the system very efficient from the users' point of view, but it has been difficult to accept within the framework of some very individualistically oriented legal regimes.

The sub-project at Hanken aims to assess if these governance mechanisms grown out of unique Nordic history may be extended to other jurisdictions and transplanted in a disparate culture as China. We will first explore the legal basis for collective rights management and collectivization in IP rights in general and place them in the context of the theory of legal transplant. Secondly, based on practice surveys both in Nordic countries as well as in China, we will construct a typology of collective rights and dispute management in China and in Nordic countries. Based on these two types of information, we will test the locally motivated legal transplant thesis to identify factors that may determine success of the transplanted system of collective rights management, including ECL. Hanken will be the main driver of the research track on the collective rights and disputes management and Helsinki University research team will complement, wherever necessary.

**(2) Enforcement of Intellectual Property and National Innovation Strategies (Helsinki University).** The theoretical context of the research will be based itself on International Relations Theory (e.g. Paul, 2010) The background is that the evolution of the international IP Regime is a strongly politicized process within the framework for international politics. The TRIPS-agreement and its WTO-panel procedures are strongly integrated in the international governance of globalization.

The growth of international trade and the globalization of the economy, the expansion of means of communication make the cross-border circulation of counterfeiting and piracy products easy and common, which results into economic losses and harm to consumers. The critical need for stronger, coordinated and balanced enforcement of IPRs against counterfeiting and piracy has been an important policy agenda for European countries. For China, enforcement has been typically casted as the legal transplant from external pressures. The accession to the WTO in 2001 has promoted considerable strengthening of IPR protection in China and now on the statutory text, enforcement in China includes administrative enforcement, civil

enforcement, criminal enforcement and customs enforcement. Administrative enforcement is a unique feature of the enforcement mechanism in China which demonstrates a strong characteristic of state intervention against rights violation. While initially perceived as a reaction to external pressure, the need to implement the laws is expressed as locally motivated policies. The Chinese government IPR Strategy Outlines published in 2008 explicitly acknowledged some weaknesses in Chinese intellectual property system. (Chinese State Council 2008). These strategy guidelines form a link between global and local governance of IP.

The norm-setting and the national IP-strategies aim at regional transformation and economic progress. Since the 90s it is generally admitted that economic interdependence and cooperation can promote regional transformation. The comparative study will study how the global norm- setting interacts with regional actors who are not only norm-takers, but also norm-makers and norm-givers. who actually have an impact on how the system works. The study will map on one hand the similarities and differences in terms of regarding the enforcement of IPRs from a global perspective where the standards set out in the TRIPS-agreement will form the base. On the other hand we want to study how these standards are dealt with by local actors who have to deal with them in a local context where economic, cultural and legal traditions play an important role, evaluate the effectiveness of the enforcement measures in these jurisdictions respectively, further discover the underlying reasons that result in the differences. The proposed research represents a substantial and original contribution to the knowledge in comparative intellectual property law. The research will not focus so much on differences in legislation or procedures, we are more interested in understanding the process and context of enforcement of intellectual property rights in China and to make some comparisons to the European Union legal system including Finland.

Within this part of the project, two main research tasks will be carried out. The first one will focus on “IT patent infringements and regional protection in China”. The second one will focus on the relationship and interdependence between national innovation strategies and IP enforcement. The background is that the Chinese IPR Strategy Outlines (2008) explicitly acknowledged some problems in the China IPR system as the deficiency of the IP law, the inadequacy of self-innovation, the poor awareness of intellectual property in the public, the insufficient ability for domestic market players to utilize IP, extensive infringement of IP etc. Thus, it is worthy to trace the following measures and to study and evaluate the effects with respect of these targets and measures. These measures will then be analyzed from the point of view of different forms of IP enforcement as described above.

**Consortium:** Based on these two subprojects, the Consortium would test the legal transplant thesis and explore if the transplant thesis should apply not only to the introduction of strictly legal norms and doctrines but also of the introduction of new practices (right managements, dispute resolutions and non-judicial enforcement mechanisms). PIs will be working on this task of consolidating research findings and build theoretical and normative findings based on two subproject. Factors affecting the success of the legal transplant of norms the governmental IPR policies in China,

EU, and Finland may make the enforcement of IPR have different characteristics because they want to reach different targets and the political and economic, cultural elements may make the enforcement of IP law more diversified.

The consortium of the Hanken School of Economics and Helsinki University, Faculty of Law ideally composed to explore interdisciplinary research topic such as comparative intellectual property law and policy. The intellectual property law in the EU, Finland and China are one of the most dynamic legal fields. The comparative study on intellectual property law in these jurisdictions by the Consortium will contribute greatly to the legal academic and enrich the understanding of the different legal systems and the concept of legal transplant. The project aims to present an explorative Sino-Finnish comparative law study, based on interdisciplinary resources available at two Finnish consortium partners as well as unique collaboration among the partners of Chinese institutes. One caveat of the project is that as an explorative study on particular aspects of intellectual property, we do not aim to present a general and uniform theory of legal transplant.

#### **4. Research methods and material, ethical issues**

##### **Research Methodology**

In analyzing this research questions, the research project adopts comparative law methodology. Comparative study is an essential research method applied in this research. Law in different jurisdictions may employ different approaches to deal with the similar problems, but reach a same or similar objective. Comparative study of law helps to gain better understanding of legal rules and attain a broad knowledge on specific legal issues. It may help to find a better solution to a legal problem and to conduct common rules for different countries.

The research will analyze, compare, and contrast the relevant rights management and dispute resolution and enforcement mechanisms and the laws, and their underlying regulatory structures in China, in Nordic countries and in Europe. As the changes and practices are on-going and dynamic, the research adopts a method of comparative law beyond traditional comparative legal analysis of comparison of norms. We will compare not only the norms but also the practices arising out of institutions and organizations that are at a peer authoritative positions, Thus, not only legislation, and judicial enforcement of laws at the courts, we will explore the actual rights and disputes management practices (i.e. local collective rights management organizations and clearing houses), as well as the enforcement mechanisms outside the courts (i.e. custom measures) used in China and in European countries. This method will enable us to abstract the findings from functional and country-specific approaches to comparative institutional analysis which will allow for general normative recommendation. The researchers will collect concrete empirical material concerning IP-litigation and administrative enforcement in China.

##### **Materials**

To ensure that the information that we collect are accurate, the Consortium will adopt a method of social science to establish internal validity of data through collecting data

from at least three different points – official text of law as sources of authorities, secondary documentation from commentary and media, and thirdly evidences of local right management and enforcement practices.

In the legal and theoretical part of the research, we will collect and analyze treaties, directives, regulations as well as decisions and opinions, and unbinding EC guidelines and communications, as well as authoritative practices of the administrative agencies that may impact on the collective management and enforcement of IPRs. Legislations and cases in these jurisdictions are open and publicly accessible. These materials will be collected through official journals, official websites and other publications, and interview with relevant specialists if necessary. These materials will be categorized and processed based on several research subjects.

Second type of data may be collected through literature review through researching Westlaw database as well as other social science research data base available in Finnish national library systems. In China, similar data will be collected by researching secondary sources of authorizes (legal periodicals and law reviews) as well as academic monographs.

The third type of data may be collected empirically. The first traditional material that will be collected is selected case material from Chinese courts. Furthermore data will be accessed through quantitative survey or through qualitative analysis conducted in the form of semi-structured user interviews. When a quantitative analysis is conducted, it will be conducted through the use of questionnaires. The survey will be administered by mail, e-mail/Internet, telephone and video conferences. The sample frame will be built by using the most prominent databases and the survey will span about thirty questions concerning particular conditions to collective management organizations or dispute settlement bodies or on the procedures of enforcement mechanisms. When a qualitative interview is conducted, it will be conducted either in person or by phone/video conferences. When possible the interviews will be recorded, otherwise notes will be taken. Most of the interviews with the parties located outside Finland will be conducted via video conferences or by phone. Cost for the interviews might need to be occasionally arranged according to the companies' specific needs and available funds.