



Copyright and the Public Interest in China

Guan H. Tang

ELGAR INTELLECTUAL PROPERTY AND GLOBAL DEVELOPMENT

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Edward Elgar

Cheltenham, UK • Northampton, MA, USA

This book is dedicated to Deng Mianqing and Tang Xiaming;
two diligent educators I admire,
the first tutors and friends in my life,
my loving parents.

谨将此书献给唐侠鸣先生和邓勉卿女士：
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¹ i.e. 师者, 传道授业解惑也。See 韩愈, 《师说》 (802); Han Yu, *The Theory on Masters*, 802. Han Yu (768–824) is a celebrated philosopher and also essayist in the Tang dynasty.

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Introduction

The real measure of a nation's wealth is the stream of goods and services that it creates.¹

Copyright as a legal concept originated in the United Kingdom (UK) under the 1709 Statute of Anne, which was introduced as an act to promote the encouragement of learning. Thereafter, copyright has developed from a domestic law that regulated the rights of copying in the publishing industry to a generally established global regulation that has extensive influences on almost every modern industry.

In the modern world, copyrighted works are protected both by national laws, in individual countries, and international laws such as the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). The Berne Convention sets out the international aspects and standard of copyright protection, including the limitations or exceptions to copyright. The exceptions to copyright are justified through the use of the “three-step test”, which is the critical measurement for defining all copyright exceptions. It states that firstly, limitations or exceptions to exclusive rights must be confined to certain special cases; secondly, these cases must not conflict with the normal exploitation of a work; and thirdly, these cases must not unreasonably prejudice the legitimate interests of the copyright holder. The three-step test was first set out in the Berne Convention and was then incorporated and enhanced in other international treaties, such as the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994, the WIPO Copyright Treaty (WCT) 1996, the WIPO Performances and Phonograms Treaty (WPPT) 1996 and the EU Copyright Directive 2001.

Recognised lawful uses in situations where an exception to copyright may be claimed are threefold: the direct consent of the authors or right owners; permitted acts such as fair use or fair dealing; and the public interest. The last category is not expressed in the Berne Convention, but is derived from the need to defend and balance the rights of the copyright

¹ E. Butler, *Adam Smith: A Primer* (2007), 38.

owners with broader public interest requirements, primarily in relation to education, research and access to information.²

Conceptually, copyright originated and evolved from a desire to expand the public interest and was progressed through legal statute in order to enable the encouragement and promotion of knowledge. The law provides authors and copyright owners with exclusive but limited rights in order to safeguard their rights and needs for the protection of copyrighted works, whilst balancing this against the broader public interest aspiration to encourage the spread of information and knowledge. This is the fundamental and critical balance that copyright aims to uphold, through the specific public interest exemption granted by national copyright laws.

The Berne Convention has provided the overarching common standards of copyright protection, but the development of copyright law in each country may differ owing to the significant effect of individual political, economic, social or cultural circumstances. For instance, whilst the UK, the mother country of modern copyright, enacted the Statute of Anne in 1709 and the United States of America (US) derived its federal copyright law from this model in 1790, it was not until 1990 that modern copyright law came into force in the People's Republic of China (China). Copyright law and its legal structure have developed rapidly in China over the past three decades, being primarily based on the Western model and also being regulated by international standards.

The development and enforcement of copyright in China has been both unique and problematic, being strongly influenced by various factors such as its own history and culture, as well as international pressure. The copyright system in China has been strongly advocated and influenced by the international community including the US and the UK, but also reflects traditional Chinese culture and the values of socialism. In accordance with the Constitution, Chinese copyright has three specific aims. These are to protect the copyright of authors in their literary, artistic and scientific works and their copyright-related rights and interests; to encourage the creation and dissemination of works; and to promote the development and prosperity of science and the socialist culture. The public interest, in the Chinese copyright regime, is not only a fundamental principle emphasised by the law and a recognised legal defence for copyright exemption, but is also a justification in its own right that regulates works free from copyright. Furthermore, it provides the legal basis for administrative copyright enforcement in China, which grants the relevant administrative authority a quasi-judicial power.

² See Preamble, Berne Convention.

So as to develop a more dynamic understanding of what the public interest means in relation to modern copyright and to facilitate the evolution and development of Chinese law and policy in this respect, this book aims to study and evaluate the topic primarily under the Chinese copyright law, but also making reference and comparison to UK and US law, as appropriate. The generation and circulation of information and knowledge is a fundamental mission of educational establishments, retaining a wealth of information and data in libraries and archives and in so doing protecting and developing the public interest by making available and building upon this diversity of material and resources. As key institutions in China have greatly benefited from Western concepts and experiences, the application of copyright in these areas and the topical issues arising within them have been selected for discussion in this book, together with the administrative enforcement of Chinese copyright and the development of the Internet in China. Administrative enforcement is sanctioned by Chinese copyright law in the name of the public interest. The development of the Internet is of significance not only to copyright law in China, but also to Chinese society in general and, in this respect, the Chinese approach to Internet regulation has been heavily criticised by the international community.

The book consists of six chapters. It should be noted that most of the chapters include a comparison with the UK and US positions. This is because (1) modern copyright law is absolutely foreign to China, the formation of the Chinese copyright system being very much a direct product of the US-China trade agreement; (2) as the copyright system originated in the UK and is well developed in the US, the enforcement of relevant laws is rather effective in both countries, whilst copyright protection together with the legal system in China is still in for the long haul; (3) Chinese stresses 饮水思源, "When drinking water think of its source." Hence the foremost copyright law makers share the experience of studying in the UK and have been influenced by the UK copyright model. Chinese law is therefore in fact akin to the UK provisions in many ways. Above all, it is hoped that such a comparison may facilitate a better understanding of the universal law of copyright despite the typical division of continental and Anglo-American laws, thus allowing an objective evaluation of current Chinese copyright, which most importantly may assist future law-making improvements in particular areas.

Chapter 1 provides an historical background, explaining the diverse Chinese traditions and China's legal culture, as well as the development of the Internet in China, which is of importance to the country's opening up to the rest of the world, its integration into the global economy and a changing notion towards law and the public interest. Chapter 2 offers an introduction to Chinese copyright law and different aspects of the

public interest. It also presents relevant knowledge, understanding and an appreciation of this field. With a brief history of the development of copyright and the public interest, the chapter outlines, firstly, how legislation is developing in China; secondly, how the Chinese concepts of copyright together with the public interest and the entire system are affected by international influences; and thirdly, how these laws are enforced in cyberspace. Chapter 3 introduces the Chinese system of copyright enforcement and focuses on administrative copyright enforcement, the quasi-judicial power of the administrative authority, which is granted in the name of the authorship public interest and which results from long-standing cultural and legal practice in China. Particularly, this chapter explores the origin of administrative enforcement in China and its jurisdiction, implementation and coordination with the rule of law, in the light of an up-to-date case analysis. Chapter 4 presents the framework of Chinese education, which is modelled on the Western system and which explores the diverse legal attitudes towards copyright implications within educational institutions on the ground of the public interest. UK and US practices are discussed in order to demonstrate the distinction between the Chinese and Western approaches. Chapter 5 observes the exceptions provided in national copyright law for libraries and library users. It highlights the issue of copying in both actual and virtual environments and looks into how copyright is imbued with the public interest concept and how the legislation balances the interests of the right holders and the users in the context of public libraries. The position in China is contrasted with that in the UK and in the US. The focus of Chapter 6 is the opening of public archives in China and the relevant issues arising in the public's access to and use of archives, which are of particular interest to the Chinese archives sector as well as the public, together with other topical issues such as access to government information and state claims of copyright. Again, the position in China is contrasted with that in the UK and in the US.

The book finishes with conclusions based on the chapters outlined above. It does not summarise all the views and suggestions on the subject matter of the book, but rather focuses on the Chinese system, discussing the prospects for Chinese copyright and its enforcement in the impacted sectors and beyond.

1. AN EMPIRICAL STUDY IN 2007 AND 2008

In order to examine the adaptation of copyright laws in Chinese educational institutes, including their libraries, and to determine the extent of

genuine knowledge about the use of copyright works in these sectors, an empirical study was conducted in 2007 and 2008, when 17 institutes and 55 people were surveyed, including 25 university staff and 30 university students. It was decided to perform the study in Shenzhen and Baotou, owing to their differing and representative characters. Shenzhen exemplifies the fast-growing cities along the east coast, whilst Baotou is representative of numerous prosperous cities in the north and the centre of China. The two cities are different in many ways and it is notable that these differences are reflected in the survey.

2. INTERVIEWS IN SZU

Shenzhen is the oldest Special Economic Zone in South China and is situated close to the border with Hong Kong. It is also the fourth richest city in the country and the GDP in 2007 was over RMB 6000 billion yuan.³ Adopting semi-structured interviews, the survey was carried out at SZU in order to gain an understanding of up-to-date copyright practices within the university and its library and to understand the awareness and opinions of students and staff relating to the use of copyright works.

The interviews at SZU were conducted with eight staff, including the president of SZU and the head of the university library, and 30 students, between December 2007 and January 2008. Each interview ran for around 60 minutes with the exception of the head of the library, which lasted for over 90 minutes. In the last five to ten minutes of the interview, interviewees were encouraged to make open remarks, and these were duly noted. Two slightly different sets of topics were designed for the university staff and students and for the head of the library respectively, as set out below.

- For the university staff and students the topics for interview included courseware (including its design and photocopying), rights relating to lesson plans and exam questions, recording of lectures, digitisation of works, use of library collections, photocopying and downloading, any concerns regarding photocopying and downloading, copyright notices and knowledge about copyright laws in relation to educational use.
- The topics for interview with the head of the library included the

³ See http://www.sztj.com/pub/sztjpublic/tjfx/tjbg/t20080128_10070.html, retrieved on 22 March 2011.

topics above, but also covered library collections, legal deposits, declaration forms, copyright notice and licensing schemes, services including photocopying and downloading, differences between copying for commercial and non-commercial purposes, charges for photocopying and distribution, interlibrary loans, digitisation and lending and copying of audio, video and other materials.

Overall, the interviews were well received and there appeared to be very positive interaction during the interviews. All interviewees were happy to have these conversations used in any research materials and did not request that their anonymity be protected.

The findings of the interviews are outlined below:

- Of the staff, eight were aware of copyright when designing courseware and acknowledgements were normally given unless “some are too small or minor”. However, they did not think it was necessary to obtain permission since it was for an educational rather than a commercial purpose. Of the students, 21 had no opinion on this topic “because I am a student”, whilst nine thought it would be better if the lecturers were conscious of copyright requirements.
- A total of 6 staff and 30 students thought that it was not only appropriate but was also more efficient if courseware was photocopied for and distributed to students by the lecturer, which was the most common method at the university. One member of staff pointed out that photocopying for students may be disputed by modern law, but is definitely supported by Chinese custom.
- Seven members of staff thought that the copyright of lesson plans should be owned by the university, unless the lesson plans were not developed for the university curriculum. Of the students, 12 believed that the copyright should be owned by the lecturer, 5 thought it should be owned by the university, 8 said they did not know and 5 said that they did not care.
- Although eight members of staff agreed that exam questions were intellectual and time consuming, six of them believed that exam questions should not be copyrighted for academic benefit and the public interest, whilst two thought it should be further discussed. Of the students, 28 strongly disagreed that the composition of exam questions should have copyright, “otherwise”, 17 of them commented, “what would be the differences between our country and the capitalist ones?”, whilst two students said they had no opinion on this topic.
- Of the staff members, seven thought that teachers should have

copyright over their lectures and 1 was not sure, whilst 10 students thought the lecturer must have the copyright, four thought the university would be the proper owner, 13 did not think there was any copyright over lectures and three did not have an opinion.

- In respect of the recording of the lectures, four members of staff thought that the teacher should own copyright of the talk while copyright of the recording itself should be owned by the person who recorded the lessons unless “they were recorded in secret”, whilst another four said they were not sure and were not able to say more because they had never thought about that topic before. The members of staff jokingly advised, “It would not be a problem to me anyway.” The opinions of the students were largely the same as for the previous topic, except that 3 out of the 13 above who did not think that there was copyright covering lectures thought this time that “copyright of any recording should be owned by the person who recorded the stuff”.
- A total of seven members of staff and 27 students thought digital databases were very helpful for their teaching or study and they were satisfied with the university library’s digital collections. In addition, they thought digitisation of works would be necessary to enable distance learning and would also be the future trend for education. They would be comfortable with their works being digitised, but would be “very careful” about the digitisation of others’ work. Nine students mentioned that digitisation was more environmentally friendly, whilst one member of staff and two students claimed themselves to be “old fashioned” and did not pay attention to and did not like digital “stuff” at all. The university library had lawful subscriptions to many popular databases and a good collection of digitised works, which allowed campus users to access the material through the Internet, without the need for authorisation for the use of each work. A general text of “we will remove your work immediately if you object” was published on the website.
- Regarding the use of library collections, all interviewees except one member of staff said that they would not spend time checking if materials were pirate copies.
- Five members of staff and five students were copyright-conscious when photocopying and downloading at the university, whilst the rest of the group thought it was unnecessary because “the purpose would not be for making money”.
- The main concern for the members of staff when photocopying was the number of copies they made and whether an entire book was being copied, whilst for the students it was the cost.